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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES D. CROWLEY, *et al.*,
Petitioners,

v.

GEORGE P. SHULTZ, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a district court's decision ordering relief specifically sought in the complaint, which includes a determination of entitlement to attorney's fees, is a *final judgment* for purposes of appeal *prior* to the determination of the amount of attorney's fees, so as to preclude the applicability of the Equal Access to Justice Act because only the determination as to the amount of the fees was pending on the effective date of the Act?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Dorothy A. Bodeen; the American Federation of Government Employees, AFL-CIO; and American Federation of Government Employees Local 1534, AFL-CIO are plaintiffs in the class action. The United States of America is a co-defendant/respondent with the Secretary of State.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 802 F.2d 498 (App., *infra*, 1a-30a). The opinions of the District Court are not reported (App., *infra*, 31a-38a, 40a-49a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1986 (App., *infra*, 85a-86a). A petition for rehearing was denied on December 12, 1986 (App., *infra*, 87a-91a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns §§ 204 and 208 of the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2321, 2325, 2327 (1980), *amended by* Act of August 5, 1985, Pub.

L. No. 99-80, 99 Stat. 183, 184-187 (current version at 28 U.S.C.A. § 2412 (West Supp. 1986)) (App., *infra*, 92a-94a).

STATEMENT

A. Statutory Background

The Equal Access to Justice Act, 28 U.S.C. § 2412(d) (hereinafter "Act" or "EAJA") (App., *infra*, 92a), provides *inter alia* that attorney's fees and other expenses may be awarded to a prevailing party, in addition to costs, in a civil action brought against the United States in which either the government's position was not substantially justified or special circumstances do not make an award unjust. As originally enacted in 1980, § 208 of the Act stated that it is applicable to civil actions which are pending on, or commenced on or after October 1, 1981 (App., *infra*, 94a). The principal question on appeal was whether the instant action was pending on that date so as to be subject to the EAJA's provisions.

B. Proceedings Below

Petitioners Crowley, *et al.* (hereinafter "Crowley") filed a class action complaint in 1974 seeking damages, injunctive relief, *and* reasonable attorney's fees in a challenge to the legality of a State Department employment practice (App., *infra*, 2a). Crowley complained that the State Department improperly placed civil servants in overcomplement status, and thereby abolished certain positions, but retained the employees at other positions with the same compensation (App., *infra*, 15a). In 1977 the District Court granted partial summary judgment to the class, declaring the challenged practice unlawful and enjoining its continuation. *Crowley v. Kissinger*, Civil Action No. 74-0494 (D.D.C. June 24, 1977) (Memorandum). The parties subsequently stipulated that individual claims could be considered by a Special Master, whose recommendations would be appealable to the District

Court (App., *infra*, 2a). On May 22, 1980, the District Court affirmed the Special Master's findings that class members were entitled to back pay and adopted his conclusion that class members were eligible for attorney's fees under the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii) (1982). *Crowley v. Muskie*, 496 F. Supp. 360 (D.D.C. 1980) (App., *infra*, 75a).

The government filed a timely notice of appeal from the District Court's decision, but voluntarily withdrew the appeal on September 12, 1980. Thereafter, Crowley filed an application for attorney's fees and costs on September 26, 1980. A year later, by order of September 15, 1981, the District Court awarded attorney's fees under the Back Pay Act (App., *infra*, 68a-74a). A subsequent motion by Crowley for partial relief from that judgment was granted on December 9, 1981.

The government appealed the award of attorney's fees, and the U.S. Court of Appeals for the District of Columbia Circuit reversed, holding that Crowley was not entitled to attorney's fees under the Back Pay Act. *Crowley v. Shultz*, 704 F.2d 1269 (D.C. Cir. 1983) (*"Crowley I"*) (App., *infra*, 51a-65a).

By timely motion, Crowley subsequently applied for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ("EAJA"). The District Court held that plaintiffs were entitled to attorney's fees, *Crowley v. Shultz*, Civil Action No. 74-0494 (D.D.C. May 16, 1984) (Memorandum) (App., *infra*, 40a-50a), and subsequently fixed the amount of those fees, *Crowley v. Shultz*, Civil Action No. 74-0494 (D.D.C. July 23, 1984) (Memorandum) (App., *infra*, 31a-39a).

Again, the government appealed, and again the Court of Appeals reversed, holding that the District Court's order finally disposing of the merits of Crowley's suit was final and appealable in 1980 notwithstanding the pendency of the claim for attorney's fees which had been

made in the complaint. *Shultz v. Crowley*, 802 F.2d 498, 505 (D.C.Cir. 1986) (*"Crowley II"*) (App., *infra*, 1a-30a). As of the effective date of the EAJA, October 1, 1981, no appeal of the District Court's order was pending and the time to file an appeal had expired, so the suit was not pending on that date within the meaning of the EAJA's section 208, the Court reasoned, over a dissenting opinion. *Id.*, App., *infra*, 13a-14a. Consequently, Crowley is not entitled to an award of attorney's fees under the EAJA, the Court held. *Id.*

The dissenting opinion vigorously disagreed, concluding that, under Federal Rule of Civil Procedure 54(a) read in the light of 28 U.S.C. § 1291 and of this Court's decision in *Liberty Mutual Insurance Company v. Wetzel*, 424 U.S. 737, 742, 96 S.Ct. 1202, 1205-06 (1976), the District Court's 1980 order did not become an appealable final decision until all of the relief prayed for in Crowley's complaint—including the complaint's prayer for attorney's fees—had been disposed of by the September 15, 1981 attorney's fees award. *Crowley II*, 802 F.2d 510-11 (App., *infra*, 15a, 25-26a). Because the time for appealing that final judgment had not yet expired on October 1, 1981, Crowley's suit was still pending on the effective date of the EAJA, which authorized fees to Crowley, the dissent would have held. *Id.*

Crowley's petition for rehearing with a suggestion for rehearing en banc was denied on December 12, 1986 (App., *infra*, 87a).

REASONS FOR GRANTING THE PETITION

This case merits the Court's review for two reasons: (1) to resolve the conflict between the Courts of Appeals as to the meaning of the term "judgment" for purposes of determining both the applicability and procedural requirements of an attorney's fees statute, and (2) to determine the propriety of the evisceration of the finality principle effected by the petitioned-from decision's hold-

ing in this case that all relief requested in the prayer of the complaint need *not* be disposed of by the District Court in order for a reviewable final decision to be manifest.

1. Congress has enacted well over one hundred attorney's fees statutes. See Appendix to Opinion of Brennan, J., dissenting, in *Marek v. Chesny*, —— U.S. ——, 105 S.Ct. 3012, 3035 (1985). The instant question involves the Equal Access to Justice Act, Pub.L. No. 96-481, 94 Stat. 2321, 2325, 2327 (1980), *amended by* Act of August 5, 1985, Pub.L. No. 99-80, 99 Stat. 183, 184-87 (current version at 28 U.S.C.A. § 2412 (West Supp. 1986)) ("EAJA"). Like the EAJA, most, if not all, fee-shifting statutes are unclear as to which orders are and which are not "judgments" for purposes of entering timely fee motions or of the applicability of the statute to a particular order. See *e.g.*, *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162 (1982) (request for attorney's fees under the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988, was not a "motion to alter or amend the judgment" subject to the ten-day timeliness standard of Federal Rule of Civil Procedure 59(e)). The petition at bar provides the opportunity to resolve a question "of substantial confusion and disagreement among the federal circuits," *Crowley II*, *supra*, 802 F.2d at 501, citing Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L.REV. 207, 224-26 (1984), to wit: whether an order which resolves all prayers for relief raised in a complaint *except the complaint's claim for attorney's fees* is properly appealable from a later order determining the amount of attorney's fees?

In the context of the EAJA from which the instant case arises the answer to the aforesaid question determines whether or not the EAJA is applicable to a given case because only "cases pending on, or commenced on or after" October 1, 1981, are within the EAJA's coverage.

Pub.L. No. 96-481, § 208, 94 Stat. 2321, 2330 (1980). If the term "cases pending" encompasses postjudgment applications for attorney's fees, then cases in which the merits of the adversary proceeding were subject to a judgment *prior to* October 1, 1981, are covered by the EAJA. Conversely, if the term "cases pending" is interpreted to mean only cases in which the merits of the adversary proceeding are still pending, and *not* to mean pending postjudgment proceedings that address only an application for attorney's fees, then the latter are not within the EAJA's coverage. The Courts of Appeals are split on this question.

The Eighth and Fifth Circuit Courts of Appeals have held, in this regard, that the fact that a motion for attorney's fees is the only matter pending before a court does not mean that court lacks jurisdiction or that the case is not "pending" for purposes of applying the EAJA. In *Knights of the Ku Klux Klan of Louisiana v. East Baton Rouge Parish School Board and U.S. Department of Health and Human Services*, 679 F.2d 64 (5th Cir. 1982) (hereinafter "*Knights of the KKK*"), the Klan was appealing the Court of Appeals' denial of attorney's fees against the U.S. Department of Health and Human Services when the EAJA became effective. Upon remand from this Court "for further consideration in light of Equal Access to Justice Act, Pub.L. No. 96-481, Sec. 201-08" (454 U.S. 1075, 102 S.Ct. 626), the Court of Appeals interpreted the EAJA to apply and stated that "[b]ecause the Klan's right to appeal [the denial of attorney's fees] had not expired or been exhausted, its action was 'pending' on the effective date for the purposes of applying the Act." 679 F.2d at 68.

Similarly, in *United States for Heydt v. Citizens State Bank*, 668 F.2d 444 (8th Cir. 1982) (hereinafter "*Heydt*"), another appeal from a denial of attorney's fees was pending before the Court of Appeals on October 1, 1981, when the EAJA became effective. Under the principle re-affirmed in *Bradley v. School Board*, 416

U.S. 696, 711-16, 94 S.Ct. 2006, 2116-19 (1974), that an appellate court must apply the law in effect at the time it renders its decision, the Court of Appeals noted the EAJA's applicability provision and concluded that it was proper to consider the fee application under the EAJA. 668 F.2d at 446.[1]

Reaching a result contrary to the Fifth and Eighth Circuits, the Courts of Appeals in *Commissioners of Highways of the Towns of Annawan et al. v. United States*, 684 F.2d 443 (7th Cir. 1982) (hereinafter *"Commissioners"*); *Tongol v. Donovan*, 762 F.2d 727 (9th Cir. 1985) (hereinafter *"Tongol"*); and *Nichols v. Pierce*, 740 F.2d 1249 (D.C.Cir. 1984) (hereinafter *"Nichols"*) held that a case is not pending for purposes of the EAJA when the only remaining issue on the effective date is the *collateral issue* of the federal government's liability for attorney's fees. The *Commissioners* Court had before it on October 1, 1981, an appeal from a denial of an application for attorney's fees by the District Court. In holding that the statutory requirement of § 208 of the EAJA was not satisfied by the pendency of only the fees issue, the Court of Appeals distinguished *Bradley v. School Board, supra*, as not involving the issue of sovereign immunity which requires that the EAJA's waiver of immunity be strictly construed. *Commissioners, supra*, 684 F.2d at 444.

The District of Columbia Circuit reached the same conclusion in *Nichols v. Pierce*, where a petition for attorney's fees under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), filed on October 7, 1980, was the sole undetermined question when the EAJA became effective. The *Nichols* Court expressly disagreed with

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[1] See also *WATCH v. Harris*, 535 F.Supp. 9, 14 (D.Conn. 1981) (Although all of the litigation had been completed and a settlement agreement signed by all parties prior to the effective dates, case found to be "pending" for purposes of National Historic Preservation Act's attorney's fees provision (16 U.S.C. § 470w-4 (1980) and EAJA).

Knights of the KKK, *supra*, and with *Heydt*, *supra*, in relying on the requirement that a waiver of sovereign immunity, such as the EAJA, must be narrowly confined to its terms. *Nichols*, 740 F.2d at 1258.[2]

In *Tongol v. Donovan*, *supra*, the Ninth Circuit addressed the EAJA's applicability when the only issue pending on the Act's effective date was the amount of the *State's* liability for attorney's fees—the liability of a non-federal co-party. Citing *Commissioners*, *supra*, and *Nichols*, *supra*, the *Tongol* Court agreed that narrow construction principles supported its holding that a case is no longer pending for purposes of the EAJA when the sole issue remaining is the extent of a nonfederal co-party's liability for attorney's fees.

Two Courts of Appeals, therefore, have adopted the reasoning that petitioner Crowley espouses: that an action is "pending" for purposes of the EAJA's applicability if the only issue remaining before the court is the determination of the attorney's fees issue. Three Courts of Appeals, as noted above, have reached a contrary result, including the panel in *Crowley II* from whose decision this petition is taken. The confusion engendered by these conflicting decisions is still a vital problem, notwithstanding the termination of the original EAJA on October 1, 1984, because Congress extended and amended the EAJA on August 5, 1985, in Public Law No. 99-80, 99 Stat. 183 ("1985 Act"). Section 7(a) of the 1985 Act provides in relevant part that "the amendments made by this Act shall apply to cases pending on or commenced on or after the date of the enactment of this Act." 99 Stat. at 186. In interpreting the applicability of the 1985 Act's amendments to cases in which only attorney's fees issues were pending on the 1985 Act's effective date, the Courts of Appeals have demonstrated

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[2] The petitioned-from decision cites *Nichols* as controlling precedent in the District of Columbia Circuit (App., *infra*, 4a).

a continuing befuddlement that would benefit from the Court's scrutiny of the EAJA. *See, e.g., Center For Science in the Public Interest v. Regan*, 802 F.2d 518, 524 (D.C.Cir. 1986) ("[T]he pivotal term,[6] 'cases pending,' encompasses fee applications . . . ."; *contra, American Pacific Concrete Pipe Co. v. N.L.R.B.*, 788 F.2d 586, 590 (9th Cir. 1986) (term "cases pending" refers only to the underlying adversary proceeding and does not include an application for fees).

2. By accepting the instant case for review the Court would be able to address more precisely the issue in *Crowley II* of whether the entry of the attorney fee award on September 15, 1981, was the *final judgment* on the relief requested in Crowley's complaint (which specifically sought attorney's fees) such that the government could have timely appealed thereafter its liability as to back pay. This issue concerns directly the vitality of the finality principle enunciated in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742, 96 S.Ct. 1202, 1205-06 (1976) (hereinafter "*Liberty Mutual*") that a "final decision" under 28 U.S.C. § 1291 does *not* exist until *all* elements contained in a plaintiff's prayer for relief have been decided by the district court.[3] If this principle is to be afforded continued effect, Crowley's prayer for attorney's fees in his complaint cannot be disregarded. Under *Liberty Mutual*, as the dissent in *Crowley II* urges (App., *infra*, 23a-26a), until the expiration of the statutory period for filing the notice of appeal under Fed.R.App.P. 4(a)(1), the entire cause of action between Crowley and the government was "*pending*" as to the merits of the case on all issues, including attorney's fees. As a consequence of this pend-

[3] Even in the event that this Court adopts the reasoning of the Seventh, Ninth, and D.C. Circuits that *postjudgment* attorney's fees applications do not constitute "pending cases" for purposes of the applicability of the EAJA, the instant case is distinguishable from those discussed *supra*, at 7-8, in that Crowley's claim for fees arose in the complaint's prayer for relief rather than as a postjudgment motion.

ency on October 1, 1981, the EAJA is applicable to Crowley's action.

The *Crowley II* Court considered this Court's decision in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162 (1982) (hereinafter "*White*"), as being dispositive of the issue of when the District Court's decision on the merits was nonappealable. App., *infra*, 6a-13a. The precise question posed in *White* was whether a *postjudgment* request for attorney's fees under 42 U.S.C. § 1988 (1982) was a motion to alter or amend the judgment subject to Fed. R. Civ. P. 59(e), which requires that such motions be filed within ten days of the entry of judgment. In answering negatively, the *White* Court reasoned that Rule 59(e) was intended to apply only to requests for reconsideration of "matters properly encompassed in a decision on the merits." Because "a request for attorney's fees under § 1988 raises legal issues collateral to" and "separate from" the decision on the merits which cannot be resolved until after one party has finally prevailed on the merits, such a postjudgment request is distinguishable from other forms of judicial relief. *White*, 455 U.S. at 451-52, 102 S.Ct. at 1166-67. Concerning the effect of the pendency of a request for attorney's fees on the finality and appealability of a judgment on the merits of a case, the Court stated: "[T]he collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable' ". *Id.* at 452-53 n.14, 102 S.Ct. at 1167 n.14, citing *Obin v. District No. 9, International Association of Machinists & Aerospace Workers*, 651 F.2d 574, 584 (8th Cir. 1981). The majority in *Crowley II* construed *White* as a "clear signal" that an order on the merits of a case is final and appealable notwithstanding the pendency of an unresolved request for statutory attorney's fees. App., *infra*, 7a.

The dissenting opinion in *Crowley II*, however, correctly distinguished *White* from Crowley's action on the

basis that *White* involved a *postjudgment* attorney's fee petition. App., *infra*, 21a-25a. Although the decision on the merits under *White* may be severable from a post-judgment motion for attorney's fees for the purpose of determining appealability issues *where the complaint did not request attorney's fees* (*White* expressly noted that the complaint therein "did not specifically request attorney's fees," 455 U.S. at 477, 102 S.Ct. at 1164), the dissent concluded that *Crowley II* should be controlled "by the long-standing principle that a 'final decision' under 28 U.S.C. § 1291 does not exist until *all* elements contained in a plaintiff's prayer for relief have been decided by the district court." App., *infra*, 23a, citing *Liberty Mutual, supra*, 424 U.S. at 742, 96 S.Ct. at 1105-06; *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 632-33 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *American Federation of Government Employees v. Federal Labor Relations Authority*, 777 F.2d 751, 755 (D.C. Cir. 1985).

A closer look at *Liberty Mutual* confirms the propriety of the dissent's reliance. The plaintiffs in *Liberty Mutual* had received *partial* summary judgment establishing defendant's liability for Title VII claims on a complaint that *did* request attorney's fees in its *ad damnum* clause. The District Court entered judgment only as to liability pursuant to Fed. R. Civ. P. 54(b) without addressing the question of relief. The Third Circuit affirmed the decision on the merits, 508 F.2d 239, 245 (3rd Cir. 1975), but this Court reversed, holding that the plaintiff had not presented separate "claims" as Rule 54(b) requires, but rather had simply presented variant prayers for relief based on a single claim. As the *Liberty Mutual* Court stated:

> It is obvious from the District Court's order that respondents, although having received a favorable ruling on the issue of petitioner's liability to them, received none of the relief which they expressly

> prayed for in the portion of their complaint set forth above. They requested an injunction, but did not get one; they requested damages, but were not awarded any; *they requested attorney's fees, but received none.*
>
> [T]he District Court's order . . . finally disposed of none of respondent's prayers for relief.

424 U.S. at 742, 96 S.Ct. at 1205-06 [emphasis supplied]. The District Court's order on liability, the Court held, was not an appealable "final decision" under 28 U.S.C. § 1291 because there had been no ruling on the injunction, damages, and attorney's fees, *i.e.*, there was no final decision on the cause of action, it was still "pending," and the judgment was not appealable as a consequence. *Id.* at 744, 96 S.Ct. at 1206-07; *cf. Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 n.5, 100 S.Ct. 745, 750 n.5 (1980) (characterizing *Liberty Mutual* as a case "where a prayer for attorney's fees against an opposing party remains unanswered").[4]

As the dissenting opinion vigorously argues, the above cases "indicate that finality of judgment for purposes of appeal is to be determined on the basis of what was included in the plaintiff's prayer for relief." App., *infra*, 24a. Both this Court's holding in *White* and the Courts of Appeals' decisions in *Commissioners*, *supra*, *Tongol*, *supra*, and *Nichols*, *supra*, discussed above, are consistent with this analysis because those actions did *not* include in the respective complaints a specific prayer for attorney's fees, as Crowley *did*. *See also*, *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985) (en banc) (holding that in a suit seeking declaratory and injunctive relief *and attorney's fees* in the *complaint*, an unresolved motion to amend the judgment to provide for attorney's

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[4] Crowley's prayer for relief, as that in *Liberty Mutual*, specifically included "costs incurred herein, including reasonable attorney's fees." Complaint at 25. The "quantum of fees [$160,000] is a major issue" in this case. *Crowley I*, *supra*, 704 F.2d at 1272, App., *infra*, 55a.

fees had tolled the time within which an appeal on the merits could be filed, and distinguishing *White* on the ground that fees therein had been requested by *post-judgment* motion). Indeed, the continued vitality of the finality principle stated in *Liberty Mutual* is preserved under holdings such as those in *Commissioners*, *supra*, and *Nichols*, *supra*, only if the request for attorney's fees in each of those cases was *not* included in the complaint's prayer for relief, "because under *Liberty Mutual* all relief requested in the prayer of the complaint must be disposed of by the district court as a prerequisite of a reviewable final decision." App., *infra*, 26a.

Assuming the continued efficacy of *Liberty Mutual's* finality principle, application of this principle to the facts of the instant case establishes the error of the court below. On May 22, 1980, Crowley received a favorable judgment from the District Court as to all issues except for the amount of attorney's fees. On September 15, 1981, the amount of the attorney's fees under the Back Pay Act was determined by the District Court. Under this Court's holding in *Liberty Mutual*, at this point the District Court's decision from 1980 (App., *infra*, 68a) became an appealable final decision.[5]

Both parties could have appealed the attorney's fees award *and* the award of back pay after the September 15, 1981 decision. The government could have timely appealed the back pay award following the entry of the

[5] This conclusion is supported by the Court of Appeals' earlier decision. In *Crowley I* the Court of Appeals based its rejection of Crowley's argument that the government's appeal of the District Court's decision as to Crowley's entitlement to attorney's fees was untimely on its belief that the entitlement decision (made over a year before the amount of fees was determined) was not a reviewable decision *until* all aspects of the claim—*i.e.*, the amount—had been resolved. App., *infra*, 54a-55a. This is "tantamount to a recognition that the time to appeal had not expired on other decisions made prior to determination of the fee amount." App., *infra*, 25a.

attorney's fees award as the *final judgment* on the relief requested in the *complaint*. Until the expiration of the 60 day statutory period for filing the notice of appeal on November 14, 1981 (*see* Fed. R. App. P. 4(a)(1)), the entire cause of action between Crowley and the government was "*pending*" as to the merits of the case on all issues raised by the complaint, including attorney's fees. *See Massachusetts Union of Public Housing Tenants, Inc. v. Pierce*, 755 F.2d 177, 177 (D.C. Cir. 1985) (per curiam) ("a judgment becomes final because an appeal is completed or foregone."). As a consequence, Crowley's action was *pending* on the effective date of the EAJA, October 1, 1981.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5667

GEORGE SHULTZ, SECRETARY OF STATE, *et al.*,
Appellants

v.

JAMES D. CROWLEY, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 74-494)

Argued: September 12, 1985

Decided: September 18, 1986

John Oliver Birch, Assistant United States Attorney, with whom *Joseph E. DiGenova*, United States Attorney, *Royce C. Lamberth*, *R. Craig Lawrence* and *Michael J. Ryan*, Assistant United States Attorneys, were on the brief, for appellants.

Lawrence Speiser, with whom *John P. Racin* was on the brief, for appellees.

Before BORK and SCALIA, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion of the Court filed by *Circuit Judge* SCALIA.

Dissenting Opinion filed by *Senior Circuit Judge* MACKINNON.

SCALIA, *Circuit Judge*: The government appeals an order awarding appellees attorney's fees under § 204 of the Equal Access to Justice Act ("EAJA"), Pub. L. No. 96-481, 94 Stat. 2321, 2325, 2327 (1980), *amended by* Act of Aug. 5, 1985, Pub. L. No. 99-80, 99 Stat. 183, 184-87 (current version at 28 U.S.C.A. § 2412 (West. Supp. 1986)). The principal question on appeal is whether this suit was pending on the effective date of the EAJA.

I

In 1974, appellees filed a class action against the Secretary of State, challenging the legality of a State Department employment practice. Plaintiffs requested declaratory, monetary, and injunctive relief, costs including reasonable attorney's fees, and such further relief as is just and proper. Complaint 23-25. In 1977, the District Court granted partial summary judgment to the class, declaring the challenged practice unlawful and enjoining its continuation. *Crowley v. Kissinger*, Civil Action No. 74-494 (D.D.C. June 24, 1977) (Memorandum). The parties then stipulated that individual claims would be considered by a Special Master, whose recommendations would be appealable to the District Court. Stipulation of Claim Procedures and Consent Order, *Crowley v. Vance*, Civil Action No. 74-494 (D.D.C. filed Nov. 1, 1978). On May 22, 1980, the District Court adopted the Special Master's recommendations as to the entitlement of various class members to monetary relief and his conclusion that class members ware eligible for attorney's fees under the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii) (1982). *Crowley v. Muskie*, 496 F. Supp. 360 (D.D.C. 1980). On July 21, 1980, the government filed a notice of appeal from the District Court's decision, but that appeal was later dismissed on the government's motion. *Crowley v. Muskie*, No. 80-1849 (D.C. Cir. Sept. 12, 1980) (Memo-

randum). Soon after, appellees filed an application for an award of attorney's fees and costs. Application for Attorneys' Fees and Expenses, *Crowley v. Muskie*, Civil Action No. 74-494 (D.D.C. filed Sept. 26, 1980). The District Court eventually granted the application. *Crowley v. Haig*, Civil Action No. 74-494 (D.D.C. Sept. 15, 1981), *amended*, (D.D.C. Sept. 25, 1981), *partial relief granted*, (D.D.C. Dec. 9, 1981). The government appealed, *Crowley v. Haig*, Civil Action No. 74-494 (D.D.C. filed Nov. 16 & Dec. 15, 1981), and this court reversed the award, holding that appellees were not entitled to attorney's fees under the Back Pay Act, *Crowley v. Shultz*, 704 F.2d 1269 (D.C. Cir. 1983). Appellees then applied to the District Court for attorney's fees under the EAJA. Motion for Attorneys Fees and Costs Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), *Crowley v. Shultz*, Civil Action No. 74-494 (D.D.C. filed June 13, 1983). The District Court held that appellees were entitled to attorney's fees, *Crowley v. Shultz*, Civil Action No. 74-494 (D.D.C. May 16, 1984) (Memorandum), and subsequently fixed the amount of those fees, *Crowley v. Shultz, Civil* Action No. 74-494 (D.D.C. July 23, 1984) (Memorandum). This appeal followed.

II

The government's principal argument is that appellees are ineligible for attorney's fees under the EAJA because their suit was not pending on October 1, 1981, the effective date of the Act. Pub. L. No. 96-481, § 208, 94 Stat. 2321, 2330 (1980). The government's argument is correct if two premises are true. The first is that a suit is not pending within the meaning of the EAJA when it has been finally resolved on the merits and only collateral issues, like the availability or amount of attorney's fees, remain to be resolved. As appellees concede, this court has already accepted that premise, in *Nichols v. Pierce*, 740 F.2d 1249 (D.C. Cir. 1984), a case decided after the

District Court decisions at issue in this appeal. Thus, all that remains is to determine the accuracy of the government's second premise, *i.e.*, that only collateral issues remained in this case on October 1, 1981.

The last order on the merits in this case was issued on May 22, 1980, when the District Court adopted the conclusions and recommendations of the Special Master regarding the entitlement of various class members to individual monetary relief. *Crowley v. Muskie*, 496 F. Supp. 360 (D.D.C. 1980). Although the government appealed this order, it voluntarily withdrew its appeal on September 12, 1980, over a year before the effective date of the EAJA. *Crowley v. Muskie*, No. 80-1849 (D.C. Cir. Sept. 12, 1980). There has been substantial litigation since then, but it has concerned only attorney's fees. It would thus appear that *Nichols* controls this case, and that appellees are not entitled to an award of attorney's fees. Appellees nevertheless argue that this case was pending on October 1, 1981, within the meaning of the EAJA as interpreted in *Nichols*, because the District Court's order of May 22, 1980, left unresolved the amount of the attorney's fees award to which it held appellees were entitled under the Back Pay Act. Since that order did not dispose of the "whole case," appellees reason, it was merely "collateral," and the government could have appealed the merits of the case for sixty days after the date on which the amount of the award was fixed (and thus the "whole case" decided). Since the amount of the award was fixed on September 15, 1981, they conclude that this suit was pending on October 1, 1981, the effective date of the EAJA.

The government did not appeal on the merits, however, instead appealing only the District Court's attorney's fees determinations. *See Crowley v. Shultz*, 704 F.2d 1269 (D.C. Cir. 1983). Thus, appellees' argument rests on the implicit assumption that a case in which an appeal on the merits *could* have been brought after the effective

date of the EAJA was pending on that date even if no appeal on the merits was *actually* brought. Our decision in *Nichols* casts substantial doubt on this proposition. *See* 740 F.2d at 1256. *But cf. Massachusetts Union of Public Housing Tenants v. Pierce*, 755 F.2d 177, 179-80 (D.C. Cir. 1985).

Even granting that assumption, however, the appellees' argument also rests upon another assumption: that the pendency of an unresolved request for attorney's fees normally affects the appealability of an order finally disposing of the merits of the case. The sole support appellees adduce for this proposition is *Crowley v. Shultz*, 704 F.2d 1269 (D.C. Cir. 1983), our earlier decision in this case. In *Crowley*, the government, appealing from an order determining the amount of the fee award to which plaintiffs had previously been held to be entitled under the Back Pay Act, sought to challenge not only the amount but also the entitlement. The plaintiffs argued that we lacked jurisdiction to consider the entitlement question, since the government had not brought a separate appeal from the earlier District Court order deciding that issue. We rejected that argument, holding that an order determining that a party is entitled to a fee award but not fixing the amount of the award is properly challenged on an appeal from the later order fixing the size of the amount. *Id.* at 1271-72. That conclusion simply sheds no light at all on the very different question presented by this appeal, *i.e.*, whether an order finally resolving the merits of a case is properly challenged on appeal from a later order finally resolving pending attorney's fees issues.

This latter question was once the source of substantial confusion and disagreement among the federal courts. *See generally* Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 224-26 (1984) (hereinafter Green, *From Here to Attorney's Fees*). This

confusion, however, has been greatly reduced by the Supreme Court's decision in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982). The precise question posed in *White* was whether a post-judgment request for attorney's fees under 42 U.S.C. § 1988 (1982) was a motion to alter or amend the judgment subject to FED R. CIV. P. 59(e), which requires that such motions be filed within ten days of the entry of judgment. The Court answered this question in the negative, relying on the following propositions: Rule 59(e) was intended to apply only to requests for reconsideration of "matters properly encompassed in a decision on the merits"; "a request for attorney's fees under § 1988 raises legal issues collateral to" and "separate from" the decision on the merits—issues that cannot be resolved until one party has finally prevailed on the merits; and attorney's fees therefore are distinguishable from other forms of judicial relief.[1] *White*, 455 U.S. at 451-52. As

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[1] Although the *White* Court had before it only a request for fees brought under 42 U.S.C. § 1988, its reasoning applies with full force to fee requests brought under the many similar statutory provisions authorizing courts to award attorney's fees to prevailing parties in appropriate circumstances—like the Back Pay Act, *see* 5 U.S.C. §§ 5596(b)(1)(A)(ii), 7701(g)(1) (1982), which is the provision at issue in this case. Subsequent cases have uniformly interpreted *White* to be fully applicable to such statutes, *see infra* pages 9-10, and we agree with this interpretation. We do note, however, that a number of courts have expressed the view that *White* is not directly applicable to requests for attorney's fees predicated upon nonstatutory sources of authority, *e.g.*, contractual agreements, which are thought to raise issues not raised by statutory fee requests. *See, e.g., F.H. Krear & Co. v. Nineteen Named Trustees*, 776 F.2d 1563, 1563-64 (2d Cir. 1985) (per curiam); *Bank South Leasing, Inc. v. Williams*, 769 F.2d 1497, 1499-1500 (11th Cir. 1985) (per curiam). *But see, e.g., Exchange National Bank v. Daniels*, 763 F.2d 286, 292-94, *modified on other grounds*, 768 F.2d 140 (7th Cir. 1985). *See generally* Green, *From Here to Attorney's Fees*, 69 CORNELL L. REV. at 278-301. We limit our discussion and holding to the issues raised by requests for statutory attorney's fees.

the *White* Court itself realized, one necessary consequence of characterizing requests for statutory attorney's fees as separate from and collateral to judgments on the merits is that the pendency of such requests can have no effect on the finality (and thus the appealability) of a judgment finally disposing of the merits of a case. *Id.* at 452-53 n.14 ("[T]he collateral character of the fee issue *establishes* that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable.'" (emphasis added) (citing *Obin v. District No. 9, International Association of Machinists & Aerospace Workers*, 651 F.2d 574, 584 (8th Cir. 1981)).

The Supreme Court's clear signal in *White* did not go unheeded; with only one exception of which we are aware,[2] every subsequent circuit court decision that has

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[2] The exception is *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985) (en banc). *Penland* was a suit by a prisoner challenging the conditions of his incarceration and seeking declaratory and injunctive relief and attorney's fees. The parties agreed to try the case before a magistrate, with appeal as of right to the district court. After trial, the magistrate granted some of the relief the plaintiff had requested but denied the rest, including attorney's fees. Within ten days after judgment, the plaintiff filed a motion to amend the judgment, asking the magistrate to reconsider his denial of the request for attorney's fees. The magistrate eventually granted the motion and awarded fees. Ten days thereafter, but over four months after entry of judgment, the plaintiff filed a notice of appeal to the district court, seeking reversal of the magistrate's partial denial of his request for declaratory and injunctive relief. The district court took jurisdiction of the appeal and affirmed the magistrate in all respects. On appeal, the Sixth Circuit, sitting en banc, sua sponte raised the question whether the plaintiff's appeal to the district court had been untimely, since over four months had elapsed between entry of judgment on the merits and the plaintiff's filing of an appeal on the merits.

The *Penland* court acknowledged that *White*, as well as *Smillie v. Park Chemical Co.*, 710 F.2d 271, 274 (6th Cir. 1983), decided after *White*, had held that a postjudgment motion for attorney's fees was not a motion to amend the judgment and thus did not toll the time within which an appeal could be brought. Nevertheless,

faced the question (even those decided by circuit courts that had reached a different conclusion prior to *White*) has held that an order finally disposing of the merits of a case is final and appealable notwithstanding the pendency of an unresolved request for statutory attorney's fees. *See, e.g., Crossman v. Maccoccio*, 792 F.2d 1, 2-3 (1st Cir. 1986) (per curiam); *Ellender v. Schweiker*, 781 F.2d 314, 317 (2d Cir. 1986); *Art Janpol Volkswagen, Inc. v. Fiat Motors of North America, Inc.*, 767 F.2d 690, 696-97 (10th Cir. 1985); *Exchange National Bank v. Daniels*, 763 F.2d 286, 292-94, *modified on other grounds*, 768 F.2d 140 (7th Cir. 1985); *Morgan v. Union Metal Manufacturing*, 757 F.2d 792, 794-95 (6th Cir. 1985); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1471 (10th Cir), *cert. denied*, 106 S. Ct. 77 (1985); *EEOC v. Gaddis*, 733 F.2d 1373, 1375-76 (10th Cir. 1984); *International Association of Bridge Ironworkers v. Madison Industries*, 733 F.2d 565, 659 (9th Cir. 1984); *Bernstein v. Menard*, 728 F.2d 252, 253 (4th Cir. 1984); *West v. Keve*, 721 F.2d 91, 95 (3d Cir. 1983); *Abrams v. Interco Inc.*, 719 F.2d 23, 26-27 (2d Cir. 1983); *Smillie v. Park Chemical Co.*, 710 F.2d 271, 274 (6th Cir. 1983); *Cox v. Flood*, 683 F.2d 330, 331 (10th Cir. 1982) (per curiam).[3] Moreover, this circuit

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it distinguished *White* and *Smillie* on the grounds that the plaintiffs in those cases had requested fees by postjudgment motion, while the plaintiff in *Penland* had requested them in the complaint; and that *White* and *Smillie* had not involved a motion to amend a judgment that had expressly denied a prior request for attorney's fees. Without making any effort to explain why these factual differences justified a difference in result, the *Penland* court held that the unresolved motion to amend the judgment to provide for attorney's fees had tolled the time within which an appeal on the merits could be filed. As we discuss below, we reject this approach.

[3] In *World of Sleep* and *Gaddis*, the Tenth Circuit declined to apply its holdings retroactively in light of the fact that prior to *White* it had operated under the clearly established rule that an unresolved request for statutory attorney's fees rendered a judgment finally resolving the merits of a case nonfinal and nonappeal-

has on three occasions indicated its agreement with this rule. *See U.S. Industries v. Blake Construction Co.*, 765 F.2d 195, 203 (D.C. Cir. 1985) (dictum); *Nichols*, 740 F.2d at 1256 (characterizing as final a district court decision that resolved the merits of a case, notwithstanding the pendency of a postjudgment motion for statutory attorney's fees; unclear whether a holding); *Webb v. HHS*, 696 F.2d 101, 104-05 (D.C. Cir. 1982).[4]

The dissent, while conceding that *White* requires this conclusion as to *postjudgment* requests for attorney's fees, nevertheless argues that the Supreme Court's holding in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976), requires a different conclusion where, as in this case, attorney's fees are requested in the plaintiff's complaint. We disagree. In *Liberty Mutual*, a district court had granted partial summary judgment to plaintiffs on the issue of defendant's liability to them, but had not addressed the question of what relief plaintiffs ought to be granted. The district court certified the judgment as final pursuant to FED. R. CIV. P. 54(b), which authorizes district courts, where appropriate in cases involving multiple claims or parties, to certify as final a judgment that is final as to one or more but not all of the claims or parties involved. Defendants appealed, and the court of appeals affirmed. The Supreme Court, sua sponte, vacated the judgment of the court of appeals and remanded the case with instructions to dismiss for lack of

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able. 756 F.2d at 1471; 733 F.2d at 1376. *See, e.g., Black Gold, Ltd. v. Rockwool Industries*, 666 F.2d 1308, 1309 (10th Cir. 1981) (per curiam); *Gurule v. Wilson*, 635 F.2d 782, 786-88 (10th Cir. 1980). For similar reasons, the Third Circuit adopted the same approach in *West*. 721 F.2d at 95. This Circuit has never had such a rule, and we see—and appellees have suggested—no barrier to applying our holding to the present case.

[4] *Webb* declined to apply its holding to the case before it, however, concluding that the case presented "unique circumstances" justifying forbearance. *Id.* at 105-06. No such "unique circumstances" are present in this case.

jurisdiction. The Court rested its disposition on the holding that, although plaintiffs had requested a number of different *types* of relief, they had brought only one *claim* for relief, and that Rule 54(b) was therefore inapplicable by its terms. *Liberty Mutual*, 424 U.S. at 742-44. The Court also noted, however, that the district court's decision was not appealable directly under 28 U.S.C. § 1291, because it did not finally dispose of all of plaintiffs' prayers for relief. *Id.* at 742. In doing so, it listed those prayers, including plaintiffs' requests for injunctive relief, monetary relief, and attorney's fees. *Id.* We see nothing in the Court's remarks that constitutes even a remote indication (much less a holding) that the district court's order would not have been appealable under 28 U.S.C. § 1291 had it disposed of all of plaintiffs' prayers for relief except the prayer for attorney's fees.

Nor can we discern such an indication in the Supreme Court's decision in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). In that case, the question was whether attorney's fees that were to be assessed against a common fund created by a class action should be assessed against the entire fund or only the claimed portion of the fund. Boeing was appealing a district court order assessing attorney's fees against the entire fund. In addition to challenging that order, Boeing attempted to argue that the district court had improperly purported finally to determine the extent of Boeing's liability to the common fund prior to the presentation of individual claims against the fund. The Supreme Court held that Boeing could not properly assert the latter argument, because it had failed to bring a separate appeal from the earlier district court order that had fixed the amount of its liability. *Boeing*, 444 U.S. 479-80 n.5. In noting that that earlier order had been final and appealable notwithstanding the ongoing dispute over attorney's fees, the Court merely noted that, unlike *Liberty Mutual*, the case before it did not involve an unresolved prayer for relief against an opposing party. *Id.*

The dissent appears to believe that this remark was intended to distinguish *Liberty Mutual* on the basis of *when* fees were requested, i.e., in the complaint in *Liberty Mutual* and (apparently) by postjudgment motion in *Boeing*. It seems far more likely, however, that *Boeing* was distinguishing *Liberty Mutual* on the basis of *who* was to pay the fees, *i.e.*, the common fund created by the plaintiffs in *Boeing* and the opposing party in *Liberty Mutual*. The latter distinction, unlike the former, has figured largely in the debate about the appropriate procedural treatment of requests for attorney's fees. *See generally* Green, *From Here to Attorney's Fees*, 69 CORNELL L. REV. at 282-297. Even if the *Boeing* Court meant to distinguish *Liberty Mutual* on the basis of when fees were requested, however, that would indicate neither that the *Boeing* Court regarded the *Liberty Mutual* Court to have *held* that an order leaving a prayer for attorney's fees unresolved was nonfinal and nonappealable nor that the *Boeing* Court believed that that would have been the appropriate resolution of the question had it been at issue in *Liberty Mutual*. At most, it would have indicated a recognition that the question did not need to be decided and a judgment that it was therefore better to pretermit it.

Nor can we agree with the dissent that the rule we apply is inconsistent with the venerable principle that a final judgment must dispose of all requests for monetary relief contained in the complaint. The dissent errs in assuming that requests for statutory attorney's fees are requests for monetary relief within the meaning of this rule. They are no more so than requests for costs,[5] which, if unresolved, do not prevent a merits judgment from

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[5] By saying this we do not intend to imply any view on the ongoing dispute over whether requests for statutory attorney's fees are in fact always properly treated as requests for costs for purposes of FED. R. CIV. P. 54(d), 58. *See White*, 455 U.S. at 454-55 n.17. *See generally* Green, *From Here to Attorney's Fees*, 69 CORNELL L. REV. at 259-68.

being final, even if (as is frequently the case) they are made in the complaint. *Cf.* FED. R. CIV. P. 58. In *White*, the Supreme Court rested its decision on the fact that "*regardless of when* attorney's fees are requested," 455 U.S. at 451 (emphasis added), they are separate from and collateral to the judgment on the merits, and distinguishable from other types of relief.

Thus, the distinction urged by the dissent is not supported by the authorities upon which the dissent relies. Moreover, it is flatly rejected by other substantial authority. In addition to the plain language of *White*, decisions of at least three circuits hold judgments to be final and appealable even though they did not resolve a request for attorney's fees contained in the complaint. *See, e.g., Ellender v. Schweiker*, 781 F.2d at 317; *Art Janpol Volkswagen, Inc. v. Fiat Motors of North America, Inc.*, 767 F.2d at 696-97; *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d at 1471; *EEOC v. Gaddis*, 733 F.2d at 1375-76; *Abrams v. Interco Inc.*, 719 F.2d at 26-27; *cf., e.g., Exchange National Bank v. Daniels*, 763 F.2d at 292-94 (unclear whether request was made in the complaint); *Bernstein v. Menard*, 728 F.2d at 253 (categorically stating that pending attorney's fees issues do not render a judgment on the merits nonfinal).

Finally, the distinction urged by the dissent has no basis in logic or policy. Whatever the arguments for and against the rule that the pendency of a request for statutory attorney's fees does not affect the finality of a judgment disposing of the merits of a suit, *compare White*, 455 U.S. at 452-54, *with* Green, *From Here to Attorney's Fees*, 69 CORNELL L. REV. 207 (arguing that *White* was wrongly decided), the dissent concedes (as it must) that the Supreme Court has authoritatively resolved that debate, at least as to postjudgment motions for statutory attorney's fees. Thus, the question is whether, given that resolution, there is any reason to accord different treatment to requests for statutory attorney's fees made in

the complaint. We can think of none, and, apart from the argument that precedent requires such treatment—which we have already rejected—neither the dissent nor the Sixth Circuit in *Penland* has suggested any. Moreover, the approach proposed by the dissent would be certain to create uncertainty and to trigger litigation on at least two fronts: on the appropriate treatment of requests for statutory attorney's fees made neither in the complaint nor by postjudgment motion (how, for example, would prejudgment motions and motions for interim attorney's fees be treated?); and on the specificity with which fees would have to be requested in the complaint in order to fall within the dissent's rule (for example, would the ubiquitous request for "such other relief as would be just and proper"—a request made by the plaintiffs both in this case and in *White*—suffice?).

We think that here, as elsewhere where a rule fixing the jurisdiction of the courts is at issue, clarity and simplicity are the chief virtues. The principles determining whether a judgment is final are already more than complex enough to bedevil both the attorneys who must follow them and the judges who must apply them, *see, e.g., Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); *Pabellon v. Grace Line*, 191 F.2d 169, 179-81 (2d Cir.) (Frank, J., concurring), *cert. denied*, 342 U.S. 893 (1951). We decline the dissent's invitation to complicate them further.

III

For these reasons, we hold that a judgment finally disposing of the merits of a suit is final and appealable notwithstanding the pendency of a request for statutory attorney's fees, whether the pending request was made in the complaint, by prejudgment motion, or by postjudgment motion. Applying this holding to the facts of this case, we conclude that the district court order of May 2, 1980, which finally disposed of the merits of this suit, was immediately final and appealable, notwithstanding

the absence of any final disposition of appellees' request for attorney's fees. As of the effective date of the EAJA, October 1, 1981, no appeal of that order was pending and the time to bring such an appeal had long passed. *See Nichols*, 740 F.2d at 1256. This suit was therefore not pending on that date within the meaning of the EAJA, and appellees are not entitled to an award of attorney's fees under that Act. In virtue of this disposition, we need not reach the other issues raised by the parties.

* * * *

The order of the District Court awarding attorney's fees to appellees is reversed.

So ordered.

MACKINNON, *Senior Circuit Judge* (dissenting): In a class action against the State Department, Crowley, *et al.*, prevailed on their claim that the Department had improperly abolished certain positions. They now seek attorney fees under the Equal Access to Justice Act (the "Act"), 28 U.S.C. § 2412 (1982 & 1985 Supp.).[1] The effective date of the Act is October 1, 1981, and our decision in *Nichols v. Pierce*, 750 F.2d 1249 (D.C. Cir. 1984), prohibits attorney fee awards under the Act if the only matters "pending" on October 1, 1981 relate solely to attorney fees. Thus this case turns on whether the case was "pending" with respect to any matters other than attorney fees on October 1, 1981. On the effective date of the Act, *i.e.*, October 1, 1981, the parties could have appealed *both* the district court's award of attorney fees under a fee-shifting statute other than the Act *and* the district court's award of back pay. Thus since the time to appeal the merits had not expired the case was still *pending*. In addition, it is my opinion the district court correctly determined that Crowley timely filed the application for attorney fees under the Act, and permissibly awarded Crowley a twenty-five percent upward adjustment of the lodestar. I therefore respectfully dissent from the reversal of the district court's award of attorney fees.

I.

Plaintiffs-Appellees Crowley, *et al.* (herein "Crowley"), in a 1974 class action complaint seeking damages, injunctive relief, *and* reasonable attorney fees, complained that the State Department improperly placed civil servants in overcomplement status, and thereby abolished certain positions but retained the employees at other positions with the same compensation. In a 1977 Memorandum

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[1] The Act expired on September 30, 1984, *see* 28 U.S.C. § 2412 (note), but was reenacted and amended on August 5, 1985. *See* Equal Access to Justice Amendments, Pub. L. No. 99-80, 99 Stat. 183 (1985).

and Order the district court granted appellees partial summary judgment. After the district court's 1977 order, the decision on the merits was not final; it was still necessary to identify the individuals who had been placed in overcomplement status, and to determine the appropriate relief and to adjudicate the claim for attorney fees. The parties subsequently entered into a consent decree authorizing a Special Master to determine the damage claims of eight individual members of the class. On May 22, 1980 the district court affirmed *in toto* the findings of the Special Master that class members were entitled to back pay and were eligible for attorney fees. *Crowley v. Muskie*, 496 F. Supp. 360 (D.D.C. 1980).

Following the determination by the Special Master, Crowley filed a motion for attorney fees under the 1978 Civil Service Reform Act amendments to the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii) (1982). The district court's decision filed May 22, 1980 adopted the Special Master's recommendation that appellees were eligible for attorney fees under the Back Pay Act. 496 F. Supp. at 362-63. The government timely filed notice of appeal from the district court's decision, but voluntarily withdrew the appeal on September 12, 1980. A year later, by order of September 17, 1981 the district court awarded attorney fees under the Back Pay Act, and on September 28, 1981 Crowley moved for partial relief from that judgment. The district court granted Crowley's motion on December 9, 1981.

The government appealed the awards of attorney fees and could have appealed the back pay award but did not. This court reversed the district court, holding that Crowley was not entitled to attorney fees under the *Back Pay Act*. *Crowley v. Schultz* (*"Crowley I"*), 704 F.2d 1269 (D.C. Cir. 1983). By timely motion, Crowley applied for attorney fees under the *Equal Access to Justice Act*. The district court held that Crowley was entitled to attorney fees for time spent litigating the case, except for time

spent litigating the issue of attorney fees under the Back Pay Act. Memorandum and Order of May 16, 1984. The district court subsequently awarded Crowley $114,044.81 in attorney fees and costs. The award contained a twenty-five percent upward adjustment in the lodestar. Memorandum and Order of July 23, 1984. The government appealed to this court, contending that Crowley was not eligible for fees under the Act, that the application for attorney fees had not been timely filed, and that the upward adjustment was contrary to the Act.

II.

The Act covers "civil action[s] or adversary adjudication[s] [involving the United State government] . . . *pending on*, or commenced on or after [October 1, 1981]." Equal Access to Justice Act § 208, Pub. L. No. 96-481, 94 Stat. 2330 (1980) (emphasis added). It is therefore necessary to determine at the outset whether Crowley's action was "pending" on October 1, 1981.

After the district court awarded attorney fees under the Act, *see* Memorandum and Order of May 16, 1984, this court decided *Nichols v. Pierce*, 740 F.2d 1249 (D.C. Cir. 1984). This decision clarified the meaning of "pending" in the context of the Act. In *Nichols* the plaintiffs were granted summary judgment on September 12, 1980 against the Department of Housing and Urban Development, in a suit challenging various procedures related to housing subsidies. On October 7, 1980 the *Nichols* plaintiffs petitioned for attorney fees under the fee-shifting provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E) (1982). The district court denied Nichol's petition for attorney fees, reasoning that the FOIA claim played such a minor role in plaintiffs' case that the case could not be considered to have been brought under the FOIA. On appeal of the district court's denial of fees, we remanded the case to the district court for reconsideration in light of the intervening passage of

the Equal Access to Justice Act. The district court denied plaintiffs' motion for attorney fees under that Act, and plaintiffs again appealed.

In interpreting the applicable provisions of the Equal Access to Justice Act, the panel in *Nichols* applied the well-established principle that waivers of sovereign immunity must be strictly construed. "As a waiver of sovereign immunity, the Act's terms must affirmatively *establish* liability, not merely fail to preclude it." *Nichols*, 740 F.2d at 1256 (citation omitted).

The *Nichols* court noted that Congress in the Equal Access to Justice Act did not define "pending," and therefore concluded that Congress used the word "pending" in its ordinary sense. The court stated: "A pending matter is one which is undecided, awaiting decision or settlement; a lawsuit is pending from its inception through the final judgment." *Id.* (citations omitted); *cf. Massachusetts Union of Public Housing Tenants, Inc. v. Pierce*, 755 F.2d 177, 177 (D.C. Cir. 1985) (per curiam ("a judgment becomes final because an appeal is completed or foregone"). Thus, a cause is pending until the time for appeal from the final judgment in the cause expires. Writing for the court in *Nichols*, Judge Wilkey stated:

> The complaint raised many substantive legal issues related to the merits of the case, but these issues were all finally resolved by the district court's memorandum and order of 12 September 1980. *That decision essentially ended the lawsuit, since there was no longer any question about whether the appellant was entitled to all of the relief requested in the complaint.* Because no appeal from that decision was prosecuted, no issue even marginally related to the merits of the suit has subsequently been subject to litigation or otherwise contested. Since there was no longer any undecided or unsettled issue in the original lawsuit, that lawsuit has not been pending from the time the district court's final order was entered.

740 F.2d at 1256 (emphasis added). Thus, according to our decision in *Nichols*, when the only matter "pending" on October 1, 1981 was a dispute over attorney fees, the merits and all requested relief having been fully resolved and not subject to further appeal, then the provisions of the Act are not applicable. 740 F.2d at 1257-58. *See also Commissioners of Highways v. United States*, 684 F.2d 443, 444-45 (7th Cir. 1982).

III.

The threshold issue in this case is whether on October 1, 1981 any disputes were "pending," *i.e.*, still appealable, other than those relating to attorney fees. The district court's May 22, 1980 decision adopted, *inter alia*, the Special Master's recommendation that Crowley was *entitled* to attorney fees (the "entitlement decision") under the Civil Service Reform Act amendments to the Back Pay Act. The government timely filed notice of appeal following that decision, but on September 12, 1980 voluntarily withdrew its appeal. No reason was given for not continuing with its appeal, but it could have been that the government considered its appeal was premature. On September 17, 1981 the district court granted attorney fees in the amount of approximately $160,000. The district court, Government, and plaintiffs all referred to this as a "judgment." *See* D.C. District Court File Nos. 239, 241, 242, 244, 246, 247, 249, 250, 253. The government on November 16, 1981 appealed to this court "from the *judgment* of this Court entered on the 17th day of September, 1981 in favor of plaintiffs . . . ." Dist. Ct. File No. 250 (emphasis added). This was the first "judgment" appealed from. The notice of appeal by the Government on July 21, 1980 stated it was from "the *order* of this Court filed May 22, 1980. . . ." Dist. Ct. File No. 132 (emphasis added). This difference in terminology is not without significance. *Cf.* 28 U.S.C. §§ 1291 and 1292. The action by the court on September 17, 1981 was ob-

viously the "final decision" in the case [2] and thereupon, under settled procedures, all issues in the cause were open for review on appeal.

However, the government challenged only the entitlement to and the amount of attorney fees awarded by the district court. In opposition Crowley argued that the government had not timely appealed the district court's entitlement decision, rendered May 22, 1980. According to Crowley's argument the government could appeal only the September 17, 1981 decision as to the amount of attorney fees, because in dropping its earlier appeal the government had foregone the right to challenge the district court's May 1980 decision as to entitlement.

This court rejected Crowley's contention, thus in effect holding that interim decisions were not appealable and that the appeal from the *final judgment* opened the entire record to review, *i.e.*, both aspects of an attorney fee award—entitlement and amount—could be appealed within the statutory period for filing appeals, dating from the district court's determination made a year later of the amount of the attorney fee award. *Crowley* I, 704 F.2d at 1271-72. Specifically, we held that the May 22, 1980 decision by the district court, holding that Crowley was *entitled* to attorney fees under the Back Pay Act, was only a partial decision since the *amount* of attorney fees remained to be determined, and thus was not a final and appealable order in the case that precluded the government from appealing the decision if an appeal was not taken within sixty days. *Id.* To have held otherwise in *Crowley I* would have required piecemeal appellate review of attorney fee awards contrary to sound policy and the requirements of our procedural rules. *See, e.g., Catlin v. United States*, 324 U.S. 229, 233-34 (1945); Fed. R. Civ. Pro. 54(b); 28 U.S.C. § 1291 (1982).

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[3] There was one subsequent minor modification. *Id.* File No. 250 (Dec. 16, 1981).

In this appeal we must decide a related question of appealability: Whether issues involved in the district court's order of May 22, 1980 were appealable when the *amount* of attorney fees under the Back Pay Act was determined on September 17, 1981. The import of this inquiry in the present case is clear, for if *only* issues relating to attorney fees were appealable on the October 1, 1981 effective date of the Act, then our decision in *Nichols* counsels that nothing was "pending" that would allow an appeal of the attorney fee recovery.

The Supreme Court decision in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982) discussed a related question of the appealability of an attorney fee application under 42 U.S.C. § 1988 [3] which arose in a case charging a violation of the Social Security Act. The court specifically noted in the first paragraph of its opinion: "His complaint did not specifically request attorney's fees." *Id.* at 447. In *White* the Court addressed the question whether a post-judgment motion for attorney fees, in a case which did not specifically request attorney's fees, was a motion to amend the judgment, which was required to be filed within the ten-day time limit of Federal Rule of Civil Procedure 59 (e).[4] In *White* a successful litigant had moved for attorney fees four and one-half months after plaintiff had

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[3] The statute provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1982).

[4] Rule 59(e) provides:

> A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(e).

obtained a judgment redressing violations of the Social Security Act and the Due Process Clause of the Fourteenth Amendment. The First Circuit held, however, that the motion for attorney fees was not timely because it was not made within ten days of entry of judgment as required by Rule 59(e). 629 F.2d 697, 699 (1st Cir. 1980). The Supreme Court reversed, holding that *post-judgment* attorney fee petitions were not governed by Rule 59(e)'s ten-day time limit on motions to alter or amend a judgment which typically have encompassed those matters within the merits of the judgment, *i.e.*, elements of traditional relief. 455 U.S. at 451. Instead, the Supreme Court implicitly treated the post-judgment attorney fee petition in *White* as collateral and independent from the merits of the litigation for purposes of appellate jurisdiction.

This conclusion follows from consideration of the interplay of Rule 59(e) (ten-day period for motion to alter or amend judgment), Rule 54(a) (defining "judgment"), and 28 U.S.C. § 1291 (final decision). "Judgment" is defined in Rule 54(a) as "a decree or any order from which an appeal lies." Rule 54(a) in turn requires reference to 28 U.S.C. § 1291, which states that only a "final decision" may be appealed to the courts of appeals. Thus, if the motion for attorney fees is not a "motion to alter or amend the judgment," then the district court's disposition of the attorney fee petition will have no effect on the finality of the validly entered "judgment." By necessary implication the judgment on the merits becomes a final decision—and hence appealable—regardless of the status of the attorney fee petition. *See* Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 Cornell L. Rev. 207, 226-27 (1984). The decision on the merits may therefore be severable from a post-judgment motion for attorney fees for the purpose of determining appealability issues, where the complaint did not request attorney's fees.

The picture is clouded, however, by the long-standing principle that a "final decision" under 28 U.S.C. § 1291 does not exist until *all* elements contained in a plaintiff's prayer for relief have been decided by the district court. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742 (1976); *Catlin v. United States*, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); *American Federation of Government Employees v. Federal Labor Relations Authority*, 777 F.2d 751, 755 (D.C. Cir. 1985). In *Liberty Mutual* plaintiffs had received *partial* summary judgment establishing defendant's liability for claims arising under Title VII on a complaint that *did* request attorney's fees in its *ad damnum* clause. Without addressing the question of relief, the district court entered judgment only as to liability pursuant to Civil Rule 54(b).[5] The Third Circuit affirmed the district court's decision on the merits. 508 F.2d 239, 245 (3d Cir. 1975). The Supreme Court reversed, holding that the plaintiff had not presented separate "claims" as Rule

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[5] Rule 54(b):

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When More than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

54(b) requires, but rather had merely presented variant requests for relief flowing from a single claim. As stated by the Supreme Court in *Liberty Mutual*:

> It is obvious from the District Court's order that respondents, although having received a favorable ruling on the issue of petitioner's liability to them, received none of the relief which they expressly prayed for in the portion of their complaint set forth above. They requested an injunction, but did not get one; they requested damages, but were not awarded any; *they requested attorneys' fees, but received none.*
>
> . . . [T]he District Court's order . . . finally disposed of none of respondent's prayers for relief.

424 U.S. at 742 (emphasis added). The Court held that the district court's decision merely on liability was not an appealable "final decision" under the statute because the court had not ruled on the injunction, damages and attorney's fees—*i.e.*, there was no final decision on the cause, it was still "pending," and the judgment therefore was not yet appealable. *Id.* at 744; *cf. Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 n.5 (1980) (characterizing *Liberty Mutual* as a case "where a prayer for attorney's fees against an opposing part remains unanswered"). In the present case, as in *Liberty Mutual*, the prayer for relief specifically included "costs incurred herein, including reasonable attorney's fees." Complaint at 25. Moreover, the "quantum of fees [$160,000] is a major issue" in this case. *Crowley I*, 704 F.2d at 1272.

These cases indicate that finality of judgment for purposes of appeal is to be determined on the basis of what was included in the plaintiff's prayer for relief. The Supreme Court's decision in *White v. New Hampshire Department of Employment Security* is not to the contrary. *White* allowed attorney fees in a civil rights action where the complaint did *not* include a specific prayer

for "attorney fees," because the statute, 42 U.S.C. § 1988, allowed attorney fees "as part of the costs." *White*, 455 U.S. at 448.

With these considerations in mind we repeat that Crowley's complaint filed in 1974 specifically requested reasonable attorney fees. Complaint at 25. On May 22, 1980 Crowley received a favorable judgment from the district court as to all issues except for the amount of attorney fees. The government timely filed notice of appeal, but voluntarily withdrew its appeal on September 12, 1980. On September 17, 1981 the district court determined the amount of attorney fees under the Back Pay Act. At that point in time—given the holding of *Liberty Mutual*—the district court's decision from the previous year, *Crowley v. Muskie*, 496 F. Supp. 360 (D.D.C. 1980), became an appealable final decision. *Crowley I* supports this conclusion, for its recognition of the reviewability of the entitlement decision made over a year before the amount of fees was determined is tantamount to a recognition that the time to appeal had not expired on other decisions made prior to determination of the fee amount.

September 17, 1981 is therefore the date from which both parties could have appealed the attorney fee award *and* the award of back pay. That the government did not appeal the back pay award does not alter the fact that the time to appeal the merits had not been exhausted. The government could have timely appealed the back pay award following the entry of the attorney fee award as the final judgment on the relief requested in the complaint. Until the expiration of the statutory period for filing the notice of appeal, *see* Fed. R. App. P. 4(a)(1), the entire cause of action between Crowley and the government was "*pending*" as to the merits of the case on all issues, including attorney fees. Therefore, on the effective date of the Act, October 1, 1981, the civil action against the government was *pending*.

The facial similarity between this case and *Nichols v. Pierce, supra,* is misleading, because the request for attorney fees in *Nichols,* as in *White,* was *not* presented in the prayer for relief. Indeed, given the continued vitality of the finality principle as stated in *Liberty Mutual Insurance Co. v. Wetzel, see supra,* this court's holding in *Nichols v. Pierce* is sensible only when the request for attorney fees is *not* included in the prayer for relief, because under *Liberty Mutual* all relief requested in the prayer of the complaint must be disposed of by the district court as a prerequisite of a reviewable final decision.

The government further argues that Crowley's motion, filed June 13, 1983, for attorney fees under the Act was invalid because it was untimely filed. Applications for attorney fees under the Act must be filed "within thirty days of final judgment in the action." 28 U.S.C. § 2412 (d) (1) (B) (1982). This court recently held that the thirty-day period "begins to run only when a judgment is 'no longer contestable through the appellate process.' " *Massachusetts Union of Public Housing Tenants v. Pierce,* 755 F.2d 177, 180 (D.C. Cir. 1985) (quoting *McDonald v. Schweiker,* 726 F.2d 311, 313 (7th Cir. 1983)). Congress explicitly adopted this interpretation of § 2412 (d) (1) (B) in its recent reenactment of the Act. *See* Pub. L. 99-80 § 2, May 15, 1985 (defining "final judgment" as "a judgment that is *final and not appealable*") (codified at 28 U.S.C. § 2412 (d) (2) (G)) (emphasis added). I agree with the district court that the date of the final judgment in this case was June 10, 1983, the date we issued our mandate in *Crowley I,* 704 F.2d 1269 (D.C. Cir. 1983), reversing the district court and ending the appellate proceedings arising from the original complaint. Crowley's motion for attorney fees filed June 13, 1983, three days after the issuance of the mandate, was therefore timely.

IV.

The Act restricts discretion with respect to attorney fees as follows:

> [A]ttorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, *such as* the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A)(ii) (1982) (emphasis added). The district court awarded Crowley an upward adjustment of twenty-five percent of the lodestar, based on the quality of representation and the *delay* in payment. Memorandum and Order of July 23, 1984, at 9-10. The government contends that any such adjustment is forbidden *as a matter of law* by the above-quoted provision of the Act. *See* Government Brief at 14. The government does not, however, contend that the district court committed an abuse of discretion in finding Crowley deserving of an upward adjustment of twenty-five percent.

The Supreme Court's recent decision in *Library of Congress v. Shaw*, —— U.S. ——, 54 U.S.L.W. 4951 (July 1, 1986), reiterates the requirement of strictly construing statutes permitting monetary awards against the United States government.[6] *Id.* at 4954. Moreover, the traditional rules against permitting awards of interest against the sovereign require, according to Justice Blackmun's majority opinion, "an added gloss of strictness upon these usual rules." *Id.* The Court's opinion in *Shaw* further

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[6] *Shaw* held that Congress had not waived sovereign immunity for an award of interest accompanying a grant of attorney fees under § 706(k) of Title VII. That section provided that "the court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, a reasonable attorney's fee as part of the costs, and the [EEOC] and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k).

stated that, for the purpose of a waiver of sovereign immunity, an award for *delay* in payment is "functionally equivalent" to an award for interest: "Interest and a *delay* factor share an identical function. They are designed to compensate for the belated receipt of money." *Id.* at 4955 (emphasis added). The Court therefore held that "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." *Id.*

The Supreme Court's decision in *Shaw*—particularly *Shaw*'s equation of interest and delay—calls into question part of this court's holding in *Action on Smoking and Health v. C.A.B.*, 724 F.2d 211 (D.C. Cir. 1984) (hereinafter "*ASH*"). In that case this court held that the Equal Access to Justice Act allows the district court to consider "other, unenumerated special factors" in determining whether to increase the award from the maximum $75 per hour specified in the Act. *Id.* at 218. This much is readily apparent from the text of the portion of the Act quoted above. *ASH* therefore proceeded to incorporate in the special factor inquiry elements traditionally considered by courts in awarding attorney fees—among those factors, delay in payment and quality of representation. 724 F.2d at 218 (citing *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc)).

The holding of *ASH* that delay in payment may be considered in an attorney fee award under the Equal Access to Justice Act cannot survive the Supreme Court's decision in *Shaw*. This follows from the holding in *Shaw* that interest and a delay-factor are "functionally equivalent," 54 U.S.L.W. at 4955, and that the waiver of sovereign immunity must be express in order to permit an upward adjustment of attorney fees for either interest or compensation for delay. Given this exacting standard, it is clear that an interest/delay award cannot come within the unenumerated "special factor[s]" considered in attorney fee awards under the Equal Access to Justice

Act. The only clarification of "special factor" within the statute is the reference to factors "such as the limited availability of qualified attorneys for the proceeding involved." 28 U.S.C. § 2412(d)(2)(A). An award for interest/delay, which would invariably be present in every case, is not a special factor such as the limited availability of qualified attorneys, which will be present only in unusual cases. This analysis is the most sensible way to reconcile the Supreme Court's holding in *Shaw*, the remaining parts of this court's decision in *ASH*, and the statutory language of the Equal Access to Justice Act.

In the present case, the district court based an upward adjustment of twenty-five percent on two factors: delay in payment[7] and quality of representation. Memorandum and Order of July 23, 1984, at 9-10. The district court's analysis thus used one factor—quality of representation—explicitly approved by this court in *ASH*, 724 F.2d at 218-20, and one factor—delay in payment—rendered invalid by the Supreme Court's decision in *Shaw*. The district court did not apportion the twenty-five percent upward adjustment between the two factors. Therefore in my opinion the case must be remanded to the district

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[7] The Act specifically allows an upward adjustment of the attorney fee award for "an increase in the cost of living." 28 U.S.C. § 2412(d)(2)(A). But the district court nowhere indicated a reliance on that part of the Act, and instead referred only to the delay factor permitted by *ASH* as an unenumerated "special factor." While delay and a change in the cost of living are similar in that they both compensate for the change in the value of money over time, they are analytically distinguishable. A change in the cost of living (or inflation), an easily verifiable factor that ordinarily should be proven by use of a reliable reference such as the consumer price index, compensates for the loss due to the change in the value of money. Delay or interest, on the other hand, compensates primarily for the loss of the use of money, and would involve different, perhaps more extensive, proof at trial. Due to the rigorous standard of *Library of Congress v. Shaw*, such distinctions are of more than semantic significance.

court to determine which portion of the upward adjustment is attributable to the quality of representation, which to delay in payment. The portion attributable to the former may stand, that attributable to the latter may not.

V.

In my opinion the court should hold that Crowley's motion for attorney fees under the Equal Access to Justice Act was pending on October 1, 1981, and was timely filed within thirty days of final judgment. Because the district court did not apportion the twenty-five percent upward adjustment between the permissible factor of quality of representation and the impermissible factor of delay in payment, I would remand the cause for proceeding not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 74-0494

JAMES D. CROWLEY, *et al.*,
Plaintiffs

v.

GEORGE P. SHULTZ, Secretary of State, *et al.*,
Defendants

[Filed July 23, 1984]

MEMORANDUM AND ORDER

On May 16, 1984, this Court held that Plaintiffs and the Estate of Harold Smith are entitled to an award of reasonable attorneys' fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The Court ordered Plaintiffs and the Estate of Harold Smith to submit revised fee petitions reflecting the deletion of hours for time expended on the litigation of fees under the Back Pay Act because Plaintiffs were not prevailing parties on that issue. Presently before the Court are the revised petitions of Plaintiffs, the original petition of the Estate of Harold Smith, and the opposition thereto.

Plaintiffs request $77,623.50 in attorneys' fees and $1,815.80 in expenses. In addition they request an upward adjustment of 25% to the attorneys' fees. The Estate of Harold Smith requests either $16,020.80 or $22,650.00 in attorneys' fees, depending on which of the

suggested alternative methods of calculation of fees the Court chooses. In addition, the Estate of Harold Smith requests $106.50 in expenses. After a careful review of the fee applications before the Court, the Court finds that the following award of attorneys' fees and costs constitutes a fair, reasonable and fully compensatory award.

LODESTAR CALCULATION

In *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980), the United States Court of Appeals for the District of Columbia Circuit adopted a "market value" approach for assessing counsel fees. Any fee setting inquiry begins with the "lodestar": the number of hours reasonably expended multiplied by a reasonable hourly rate. *Id.* at 891.

Number of Hours Reasonably Expended

The first component in determining an award of attorneys' fees is the number of hours reasonably expended on the litigation. Attorneys' fees may only be awarded for time reasonably expended, thus the application must contain "sufficiently detailed information about the hours logged and the work done." *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

Plaintiffs in this action request compensation for 1108 hours of attorney time. The Estate of Harold Smith requests compensation for 161.5 hours of attorney time. This Court has already found in its opinions of September 15, 1981 and December 9, 1981 that, with the exception of 7 hours of time which had been expended on offensive discovery, the hours expended on this litigation were reasonable. In the petitions that are presently before the Court, Plaintiffs and the Estate of Harold Smith have deleted all of the time spent on litigating the issue of fees under that Back Pay Act and have also deleted hours which this Court had previously ruled were com-

pensable. An independent analysis of the hours devoted to this action by counsel in this action indicates that they are documented in accordance with the criteria set forth in *Concerned Veterans* and were reasonably expended on the litigation.

Reasonable Hourly Rate

The remaining element in fixing a lodestar fee is to determine a reasonable hourly rate. The reasonable hourly rate is the rate prevailing in the community for similar work. *Copeland*, 641 F.2d at 892. The EAJA, however, provides that "an attorney shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor such as the limited availability of qualified attorneys for the proceedings involved, justify a higher fee." 28 U.S.C. § 2412(d)(2)(A)(ii).

Relevant considerations in determining a reasonable hourly rate include that level of skill necessary to perform the work, time limitations imposed by the representation, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case. *Copeland v. Marshall*, 641 F.2d at 892. The applicant must provide specific evidence of the prevailing community rate for the type of work for which he seeks an award.

Essentially, the Court in *Concerned Veterans* set out three types of factual showing that could be used in appropriate cases to establish "the prevailing rate in the community for similar work." First, the Court noted that the rate that the attorney who is seeking compensation actually commands in the market place is "highly relevant proof of the prevailing community rate" for his work. *Concerned Veterans*, 675 F.2d at 1325. Next, the Court said that the billing rates of other attorneys of comparable skill and experience to the applicant attorney might also constitute relevant evidence of the prevailing

community rate. *Id.* Finally, the Court stated that evidence of the prevailing community rate of an applicant attorney could also be gleaned by reference to awards of fees made by courts to other attorneys of experience and skill comparable to that of the applicant attorney. *Id.*

Plaintiffs' counsel in this action requests the following hourly rates:

Lawrence Speiser	$75/hour
John P. Racin	$75/hour
A. Lawrence Toombs	$60/hour
Judith K. Munger	$60/hour
Barbara Lindskold	$40/hour

The attorneys for the Estate of Harold Smith have both requested an hourly rate of $75 or the rates that were awarded by the Court in its earlier opinion under the Back Pay Act. These rates ranged from $75 in 1975 to $122 in 1980 for lead counsel, Ronda Billig, and $75 per hour for Mark T. Wilson. Because the EAJA limits the hourly rate to $75, the Court declines the suggestion of counsel for the Estate of Harold Smith to award a fee based on rates ranging from $75 to $122.

Based on the documentation submitted by Plaintiffs' counsel and counsel for the Estate of Harold Smith in support of the prior petitions under the Back Pay Act, and the documentation submitted in support of the petitions under the EAJA, the Court finds that the hourly rates requested are reasonable. In fact, the evidence submitted suggest that counsel can command rates much higher than the $75 limit of the EAJA.

For the reasons set forth above, the Court awards the following lodestar figures:

Counsel for Plaintiffs

	Hours	Rate	Lodestar
Lawrence Speiser	665.8	$75	$49,935.00
John P. Racin	220.3	$75	$16,522.50
A. Lawrence Toombs	79.7	$60	$ 4,782.00
Judith K. Munger	34.8	$60	$ 2,088.00
Barbara D. Lindskold	107.4	$40	$ 4,296.00
	TOTAL LODESTAR		$77,623.50

Counsel for the Estate of Harold Smith

Ronda L. Billig	140.5	$75	$10,537.50
Mark T. Wilson	21.0	$75	$ 1,575.00
	TOTAL LODESTAR		$12,112.50

ADJUSTMENTS TO THE LODESTAR

The Court of Appeals in *Copeland* indicated that as a final step in calculating an appropriate fee award, the lodestar may be adjusted to reflect other factors. *Id.* at 892. The burden of justifying an increase to the lodestar rests on the party seeking an increase. *Id.* The Court noted three adjustment factors that might be considered: (1) extra compensation for the risk that the lawsuit would be unsuccessful and that counsel would receive either no fee or an insubstantial fee; (2) extra compensation for delay in receipt of payment for service; and (3) an adjustment either up or down to reflect unusually good or bad representation taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the lodestar. *Id.* at 892-93. Later in *Concerned Veterans*, the Court recognized that those three adjustment factors were not meant to exhaust the list of circumstances which could properly be considered in adjusting the lodestar. *Id.* at 1328 n.14.

In this case, Plaintiffs' counsel request an upward adjustment of 25% for delay, the quality of representation, and the result obtained by Plaintiffs' counsel. The Estate of Harold Smith requires that the Court use a lodestar multiplier of 2 based on the same factors.

Recently, in *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211 (D.C. Cir. 1984), the United States Court of Appeals for the District of Columbia Circuit found that delay in payment since the EAJA's effective date plus the results obtained by the Plaintiffs in that action, warranted an upward adjustment of 10%. The Court held that "the provisions of the EAJA [which provide that an attorney shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor such as the limited availability of qualified attorneys for the proceeding involved, justified a higher fee] are in no way incompatible with the special factor inquiry required in *Copeland*." *Id.* at 218.

Finding that the long delay in payment (which was four years) and the successful result obtained in the case warranted an upward adjustment in the lodestar, the Court in *Action on Smoking and Health* awarded a 10% adjustment to the lodestar. The Court noted that "an important component of the quality of representation is the result obtained." *Action on Smoking and Health*, 724 F.2d at 218. In discussing the quality of representation factor and the result obtained the Court noted that a court, "however, is not to take into account the level of skill normally expected of a lawyer charging $75 per hour [the upper limit of the EAJA], but rather the level of skill expected of a lawyer commanding this lawyers' usual hourly rate." *Id.* at 219.

In this case, the results obtained were extraordinary. Plaintiffs enjoyed complete success at every stage of the litigation from March 27, 1974 to May 22, 1980. They recovered back pay for the class in excess of $225,000.

Most important, Plaintiffs insured that other employees of the Department of State, present and future, would not suffer an "overcomplement" designation operating to stigmatize them and damage their careers, without notice, or opportunity to contest the designation. The results were achieved despite vigorous opposition by the government every step of the way. The results obtained in this case justify an upward increase in the lodestar of Plaintiffs' counsel and counsel for the Estate of Harold Smith.

The delay in this case also justifies an upward adjustment. Here much of the work was done between 5 and 11 years ago. Based on these two components, delay and the quality of representation considering the results obtained, the Court awards a 25% upward adjustment to the lodestar fees of Plaintiffs' counsel and counsel for the Estate of Harold Smith.

Counsel for Plaintiffs

Total lodestar	$77,623.50
25% upward adjustment	$19,405.88
TOTAL ATTORNEYS' FEE AWARD	$97,029.38

Counsel for the Estate of Harold Smith

Total lodestar	$12,112.50
25% upward adjustment	$ 3,028.13
	$15,140.63

COSTS AND EXPENSES

Finally, Plaintiffs seek $1,815.80 in expenses for such items as photocopying, the costs of hearing transcripts, filing and service fees, and the costs of law clerks. The Estate of Harold Smith seeks $106.50 in expenses for photocopying, postage, long distance telephone calls and outside secretarial services.

Under the EAJA, costs as enumerated in 28 U.S.C. § 1920 and other expenses are compensable. 28 U.S.C. §§ 2412(a), 2412(d)(1)(A). Under § 1920, fees of the Clerk, fees of the Court Reporter for a transcript, docket fees, and photocopying expenses are compensable. Therefore, the Court finds that Plaintiffs can recover its photocopying expenses, the costs of the hearing transcript, and filing and service fees. The Estate of Harold Smith similarly can recover its photocopying expenses. Under the EAJA, however, postage, long distance calls, and outside secretarial help are not compensable. *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d at 224; *N.A.A.C.P. v. Donovan*, 554 F. Supp. 715, 719-720 (D.D.C. 1982); 28 U.S.C. 2412(d)(2)(A). Therefore, the Court declines to assess such items as expenses against the government. The Court, however, finds that Plaintiffs are entitled to reimbursement for the expense of law clerk time, it appearing to the Court that such an expense was intended to be covered by the provisions of 28 U.S.C. § 2412(d)(2)(A).

For the reasons set forth above, the Court awards to Plaintiffs $1,815.80 in costs and expenses. The Court also makes an award of $59.00 in costs to the Estate of Harold Smith.

An appropriate Order accompanies this Memorandum.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

DATE: July 23, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 74-0494

JAMES D. CROWLEY, *et al.*,
Plaintiffs

v.

GEORGE P. SHULTZ, Secretary of State, *et al.*,
Defendants

[Filed July 23, 1984]

ORDER

In accordance with the Memorandum entered this date in the above-captioned action, it is by the Court this 23rd day of July, 1984,

ORDERED, that Defendants pay to Plaintiffs the sum of Ninety-Eight Thousand, Eight Hundred Forty-Five Dollars and Eighteen Cents ($98,845.18) in reasonable attorneys' fees and costs and expenses incurred in this action; and it is

FURTHER ORDERED, that Defendants pay to the Estate of Harold Smith the sum of Fifteen Thousand, One Hundred Ninety-Nine Dollars and Sixty-Three Cents ($15,199.63) in reasonable attorneys' fees and costs; and it is

FURTHER ORDERED, that payment shall be made within thirty (30) days of the date of this Order.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 74-0494

JAMES D. CROWLEY, *et al.*,
Plaintiffs

v.

GEORGE P. SHULTZ, Secretary of State, *et al.*,
Defendants

[Filed May 16, 1984]

MEMORANDUM AND ORDER

Presently before the Court are Plaintiffs' Motion for Attorney Fees under the Equal Access to Justice Act and the Motion of the Estate of Harold O. Smith for Attorney Fees and Costs pursuant to the Equal Access to Justice Act. By stipulation, the parties have bifurcated the issues of entitlement to fees and the amount of reasonable attorney fees. This Memorandum, therefore, will address only Plaintiffs' entitlement to fees under the Equal Access to Justice Act.

Background

This action involved a challenge to the State Department's overcomplement system of personnel practices. In June of 1977 this Court granted Plaintiffs' motion for partial summary judgment and enjoined the overcomplement system. Shortly after the entry of this Order the

parties entered into an agreement for settlement of some of the damage claims and litigation of the remaining claims before a Special Master.

On May 22, 1980, this Court adopted the Special Master's findings. Plaintiffs filed a motion for attorney fees on September 26, 1980 requesting fees under the Back Pay Act as amended by the Reform Act. In September of 1981 and December of 1981 this Court entered Orders awarding fees under the Back Pay Act. Both Plaintiffs and Defendants appealed the fee award decisions. Defendants appealed the Court's finding that Plaintiffs were entitled to fees under the Back Pay Act arguing that the Savings Clause of the Reform Act barred any fee award under the Back Pay Act. Plaintiffs appealed the Court's decision to deny certain fees.

On April 12, 1983 the Court of Appeals for the District of Columbia Circuit reversed this Court's decision to award fees under the Back Pay Act. The Court determined that an award of fees under the Back Pay Act was not authorized. The mandate was issued on June 10, 1983. On June 13, 1983 Plaintiffs filed their motion for attorney fees and cost pursuant to § 2412(d) of the Equal Access to Justice Act. The estate of Harold Smith filed its motion on July 8, 1983.

The Equal Access to Justice Act

Section 2412(d) of the Equal Access to Justice Act provides:

> (1) (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the Court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not justified.

(2) (B) "party" means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed.

28 U.S.C. § 2412(d). The Act provides further that its effective date is October 1, 1981 and that it is applicable to civil actions which are pending on, or commenced on or after October 1, 1981.

Plaintiffs in this action allege that they were entitled to fees under § 2412(d) of the Act because (1) they were prevailing parties in the litigation of the merits of this case; (2) this case was a civil action "pending" on the Act's effective date even though the Court's initial order granting attorney fees was entered on September 17, 1981, two weeks prior to the Act's effective date; (3) the EAJA provides for payment of fees and expenses incurred prior to its effective date so long as the case was in fact "pending" on that date; and (4) the position of the United States was not substantially justified.

The government opposes Plaintiffs' motion for fees under the Act because it alleges that (1) Plaintiffs have not submitted a timely application under the Act because the Act provides that such applications must be made "within thirty days of final judgment" in the action; (2) the defense of this litigation was substantially justi-

fied; and (3) Plaintiffs are not entitled to fees incurred prior to October 1, 1981. Defendants concede that Plaintiffs are prevailing parties in this action and that this was a civil action "pending" on October 1, 1981.

The Pendency of the Action on October 1, 1981

It is clear that this action was "pending," within the meaning of the Act, on October 1, 1981. The initial order granting attorney fees under the Back Pay Act was entered on September 17, 1981. Because the period for appeal had not expired as of October 1, 1981, this case was pending on such date. *Knights of the Ku Klux Klan Realm of Louisiana v. East Baton Rouge Parish School Board*, 679 F.2d 64 (5th Cir. 1982); *Photo Data, Inc. v. Sawyer*, 533 F. Supp, 348, 350-351 (D.D.C. 1982).

Furthermore, on October 1, 1981, there remained unresolved issues in the litigation because Plaintiff had filed a motion for partial relief from judgment on September 28, 1981 which the Court did not grant until December 11, 1981. The pendency of such unresolved issues on October 1, 1981 made the case one which was pending at that time. *Underwood v. Pierce*, 547 F. Supp. 256, 260 (C.D. Cal. 1982).

Timeliness of the Application

The Act requires that a party seeking an award of fees and other expenses shall file its application within "thirty days of final judgment in the action." Defendants contend that Plaintiffs' application is untimely because final judgment in the action occurred some time around May 22, 1980 when this Court adopted the findings of the Special Master. Plaintiffs contend, however, that there was no final judgment in this action until June 10, 1983 when the Court of Appeals issued the mandate reversing this Court's award of fees under the Back Pay Act.

The Court is persuaded that the applications of Plaintiffs and the estate of Harold Smith for fees under the EAJA are timely. The Court rejects Defendants' argument that final judgment in this action occurred in May of 1980. Final judgment in this action did not occur until the Court of Appeals issued its mandate on June 10, 1983 reversing this Court's award of fees under the Back Pay Act. *See McDonald v. Schweiker*, 726 F.2d 311 (7th Cir. 1983); *American Academy of Pediatrics, et al. v. Heckler*, 580 F. Supp. 436 (D.D.C. 1984). The applications of Plaintiffs and the estate of Harold Smith were filed within thirty days of June 10, 1983 and therefore, are timely.

Fees Incurred Prior to October 1, 1981

Virtually every court that has considered the question of whether fees incurred prior to the effective date of the EAJA are recoverable under the Act has held that the EAJA is applicable to such fees. *See, e.g., Rawlings v. Heckler*, 725 F.2d 1192 (9th Cir. 1984); *Kay Manufacturing Company v. United States*, 699 F.2d 1376, 1378 (Fed. Cir. 1983); *Globe, Inc. v. United States*, 553 F. Supp. 7 (D.D.C. 1982); *Photo Data, Inc. v. Sawyer*, 533 F. Supp. 348, 352 (D.D.C. 1982); *Nunes-Correia v. Haig*, 543 F. Supp. 812, 814-16 (D.D.C. 1982); *Underwood v. Pierce*, 547 F. Supp. 256, 260-261 (C.D. Cal. 1982). These carefully considered opinions have rejected the position advanced by Defendants and this Court agrees with those courts' analyses. Therefore, for the reasons discussed in the cases cited above, the Court concludes that fees incurred prior to October 1, 1981 are recoverable under the EAJA because the action was pending on that date.

The Position of the Government

The Act provides that fees and other expenses shall be awarded to "a prevailing party. . . unless the court finds that the position of the United States was

substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The government does not dispute that Plaintiffs are prevailing parties within the meaning of the statute.

The government bears the burden of proving that its position was "substantially justified." *Spencer v. NLRB*, 712 F.2d 539, 537 (D.C. Cir. 1983), *cert. denied*, 52 U.S.L.W. 3756 (1984). This justificatory burden requires the government to meet a test slightly more stringent than one of reasonableness. *Id.* at 558. In this Circuit, the "position" that the government must show was substantially justified is its litigation position, not the prelitigation conduct giving rise to the lawsuit. *Id.* at 557. In deciding whether the litigation position was "substantially justified" the focus is on the legal merits of the government's arguments and the facts. *Cinciarelli v. Reagan*, No. 83-1289, slip op. at 6 (D.C. Cir. March 6, 1984). Partial awards are contemplated within EAJA's statutory scheme; if some but not all of the government's defenses are substantially justified the prevailing party should be compensated for combatting those that are not. *Id.*

In *Spencer*, the Court of Appeals listed three factors, though not exhaustive, to be considered by a court when deciding whether the government's position was substantially justified: (1) the clarity of the governing law; (2) the foreseeable length and complexity of the litigation; and (3) the consistency of the government's position. *Spencer*, 712 F.2d at 599-561.

With the exception of its position during the litigation of the attorney fees question under the Back Pay Act, the Court finds that Defendants' position in this action was not substantially justified. As the Court in *Spencer* indicated:

> Examination of the variety of kinds of controversies covered by the Act reveals that, in the large ma-

> jority of contexts, it makes no functional difference how one conceives of the government's "position." In actions brought by the United States, the governmental action that precipitates the controversy almost invariably is its litigation position. Most suits brought against the United States entail a similar correspondence. In the usual case, the government acts in a particular fashion and then defends its conduct before an administrative agency and/or a court. Under such circumstances, the litigation position of the United States will almost always be that its underlying action was legally justifiable (footnotes omitted).

Spencer, 712 F.2d at 551-552. This was precisely the case here.

Though in the litigation on the merits the government argued that the State Department's purported voluntary abandonment of the challenged overcomplement practice in February 1975 made the case moot, and that Plaintiffs had failed to exhaust their administrative remedies, the primary thrust of their case was simply that its underlying action was legally justifiable. It was this position that the Court firmly rejected on June 24, 1977 in granting summary judgment for Plaintiffs.

In this Court's Memorandum Opinion and Order of June 24, 1977 the Court noted that the "governing law" in this case was clear. The government itself, in opposing Plaintiffs' initial fee application under the Back Pay Act, argued in part that, "as plaintiffs' summary judgment motion established, courts some years earlier had resolved essentially the same question in other factual contexts." Defendants' Response to Plaintiffs' Application for Attorney Fees (October 20, 1980) at 17. Indeed, the clarity of the governing law may well explain the fact that the State Department abandoned the overcomplement system fifteen months before it defended the legality

of the practice in their motion to dismiss, and 27 months before the Court enjoined any subsequent use thereof.

Despite a purported voluntary abandonment of the challenged practice, the government at no point confessed judgment; it staunchly defended its legality instead. Once this Court entered partial summary judgment, however, the government shortly thereafter caved in. It did not appeal this Court's decision and shortly thereafter entered into a settlement and consent order. The "length and complexity of the litigation" necessary to obtain a judgment on the merits was altogether foreseeable.

Finally, during the litigation under the Back Pay Act, the government argued that the underlying litigation had not been particularly complex because of the well settled nature of the primary legal issue. Yet it had taken an altogether different position in litigating the merits, which took more than three years. Thus along with the "clarity of the governing law" and the "foreseeable length and complexity of the litigation," the eventual inconsistency of the government's position, *Spencer*, 712 F.2d at 560-561, weighs heavily against the government's claim that its position in the litigation of the merits was substantially justified.

The government's position in the litigation which followed entry of summary judgment for Plaintiffs and the consent decree and order entered on November 1, 1977, was no more substantially justified than its position in the litigation of the merits. Each of the individual claimants represented by counsel herein whose cases were heard by the Special Master obtained very significant relief, relief far beyond that offered in settlement. The scope of the relief implies that the Special Master entirely rejected the government's various positions respecting the fact and extent of career injury in each case. The settlements arrived at were also very significant.

In litigating the Special Master's recommended decisions before the Court, the government relied almost exclusively on the doctrine of sovereign immunity in opposing monetary relief to claimants whose cases had been heard by the Special Master. This argument was remarkable for a number of reasons. First, the Court's Memorandum Opinion and Order of June 24, 1977 had implicitly rejected the government's attempt to interpose the defense of sovereign immunity. In addition, the government had already provided monetary relief to those claimants who settled their case, and had offered relief which included back pay in settlement of the claims which were eventually heard by the Special Master.

Even more fundamentally perhaps, the Consent Decree and Order entered on November 1, 1977, and the Stipulation of Claim Procedures and Consent Order entered November 1, 1978 had required that relief such as back pay be provided on a sufficient showing of career injury. As this Court described the government's position, "Defendants now attempt [in their Consolidated Objections] to resurrect defenses long since waived in the instant litigation. They are precluded from doing so because of the valid settlement agreement [the Consent Decree and Order and the Stipulation of Claim Procedures and Consent Order] and the Back Pay Act." *Crowley v. Muskie*, 496 F. Supp. 360, 361 (D.D.C. 1980). The government's position in the litigation of the Special Master's recommended decisions was clearly unreasonable. As is the case with respect to the litigation of the merits and the litigation of the individual claims, the government has failed utterly to establish that its position in the litigation concerning the Special Master's recommended decisions was substantially justified.

Although this Court finds that Defendants were not substantially justified in its position regarding the litigation of the merits of this matter, the Court does find that Defendants were substantially justified in its position

regarding the issue of attorney fees under the Back Pay Act and therefore, Plaintiffs are not entitled to fees under the EAJA for the time spent in litigating this issue. The Defendants argued that the Savings Clause of the Reform Act barred any fee award under the Back Pay Act. It cannot be argued that the government's position was not substantially justified since the Court of Appeals upheld the Defendants' contentions.

An appropriate Order accompanies this Memorandum.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

DATE: May 16, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-0494

JAMES D. CROWLEY, *et al.*,
Plaintiffs

v.

GEORGE P. SHULTZ, Secretary of State, *et al.*,
Defendants

[Filed May 16, 1984]

ORDER

In accordance with the Memorandum entered this date in the above-captioned case, it is by the Court this 16th day of May, 1984,

ORDERED, that Plaintiffs and the Estate of Harold Smith are entitled to fees under the Equal Access to Justice Act for time spent in litigating this case with the exception that they are not entitled to fees for time spent litigating the issue of attorney fees under the Back Pay Act; and it is

FURTHER ORDERED, that Plaintiffs and the Estate of Harold Smith shall submit a revised fee petition on or before June 6, 1984 reflecting the deletion of time spent litigating the issue of attorney fees under the Back Pay Act. Defendants shall file its response to the revised petitions within the appropriate time limitations under the Federal Rules of Civil Procedure.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2213

JAMES D. CROWLEY, *et al.*

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, *et al.*,
Appellants

No. 81-2352

JAMES D. CROWLEY, *et al.*

v.

GEORGE P. SHULTZ, *et al.*,
Appellants

No. 82-1007

JAMES D. CROWLEY, *et al.*,
Appellants

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, *et al.*

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 74-0494)

Argued September 17, 1982

Decided April 12, 1983

John Oliver Birch, Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney, *Royce C. Lamberth*, *Kenneth M. Raisler* and *Whitney Adams*, Assistant United States Attorneys, were on the brief for Shultz, Secretary of State, et al., appellants in 81-2213 and 81-2352 and cross-appellees in 82-1007. *R. Craig Lawrence*, Assistant United States Attorney, also entered an appearance for Shultz, Secretary of State, et al.

Lawrence Speiser, with whom *John P. Racin* was on the brief, for James D. Crowley, et al., appellees in 81-2213 and 81-2352 and cross-appellants in 82-1007.

Ronda L. Billig and *Mark T. Wilson* entered appearances for the appellee, Estate of Harold O. Smith.

Before: WRIGHT, EDWARDS and BORK, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BORK.

Separate Statement of *Circuit Judge* BORK.

BORK, *Circuit Judge*: This case concerns an award of attorneys' fees under 5 U.S.C. § 5596 (1976 & Supp. V 1981) (the Back Pay Act). Provision for attorneys' fees was added to the relief available under the Back Pay Act by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 702, 92 Stat. 1111, 1216 (codified at 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. V 1981)). Included in the Reform Act was a Savings Clause, which limited the Act's retroactive applicability to certain proceedings commenced prior to its passage. Pub. L. No. 95-454, § 902, 92 Stat. 1223-24 (codified at 5 U.S.C. § 1101 note (Supp. V 1981)). The district court below granted appellees[1] attorneys' fees pursuant to the Back Pay Act. Appellants urge that this was inappropriate, arguing that the Savings Clause makes fees unavailable to these

[1] We refer to Crowley, *et al.*, plaintiffs below and appellees and cross-appellants here, as appellees. Defendants below, appellants and cross-appellees here, are referred to as appellants.

appellees, who instituted their suit before the Reform Act was passed. We agree that the Savings Clause applies, and reverse the order of the district court.

I.

This attorneys' fees litigation grows out of a suit in the district court challenging the State Department's "overcomplement" system, a personnel practice that has since been abolished. Under the overcomplement system, certain employees, while not terminated, were placed in what the appellees described in their complaint as "limbo": their positions were abolished and they were not selected for promotions or other forms of advancement. Joint Appendix ("J.A.") at 23. No notice was given to employees placed in overcomplement status, nor were they afforded any opportunity to challenge their disfavored status. Appellees filed suit in the district court in March 1974, seeking damages and an injunction against the overcomplement system.

In June 1977, the district court granted appellees' motion for partial summary judgment. The order enjoined the overcomplement system, which the court found to deny appellees various employment rights, including the process rights usually associated with adverse personnel actions, J.A. at 67-70. Subsequent to the June 1977 decree, the parties entered into an arrangement for settlement of some damage claims and litigation of the rest before a Special Master.

In proceedings before the Special Master, appellees sought attorneys' fees for the litigation, claiming under the Back Pay Act as amended by the Reform Act. Appellants opposed the demand for fees, but the Special Master recommended that the district court order a fee award.[2] The district court approved the Special Master's

[2] This appeal involves only the issues related to attorneys' fees; other objections that appellants had to the report of the Special Master are not before us.

finding that fees should be available, *Crowley* v. *Muskie*, 496 F. Supp. 360, 363-64 (D.D.C. 1980), and entertained a motion to fix the amount of the fee award. After further proceedings (during which appellants renewed their challenge to the propriety of the fee grant), the district court accepted most of appellees' fee request, and entered orders in September and December of 1981 granting approximately $163,000 in attorneys' fees to various appellees. The State Department appealed the grant of fees, reiterating its claim that the Savings Clause should have been interpreted to block any fee award. Employee plaintiffs appealed the district court's order to the extent that it denied certain claims in their fee petition. Because we find that the Back Pay Act, as amended by the Reform Act, should not be read to grant appellees any fees, we do not address the various arguments as to the quantum of fees appropriate.

II.

Appellees suggest that we lack jurisdiction to consider their entitlement to attorneys' fees. According to the appellees' theory, the district court's May 1980 order, which found that fees should be awarded but did not fix an amount, was final and appealable. The appellants noted an appeal from this order, but obtained dismissal of that appeal and instead pursued this one, which challenges both the propriety and the amount of the fee award. Appellees argue that appellants' failure to press their earlier appeal deprives us of jurisdiction over the issue addressed by the May 1980 order.

We cannot accept appellees' argument in either of the two forms it may take. Appellees appear to contend that the May 1980 order was collateral and appealable, relying on *Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131 (6th Cir. 1980) (fee award which does not fix amount is appealable as collateral order). This argument relies first on what appears to be dictum in *Memphis Sheraton*, where the court did not actually decide

the fee issue it held to be appealable, but remanded the case for other reasons, and second on the highly dubious proposition that failure to appeal a collaterally reviewable order precludes appellate consideration of the collateral issue when the entire case is before the appeals court, *see* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3911, at 498-99 (1976) (collateral order should be reviewable when issued and when whole case is appealed).

Nor are we willing to adopt the other form of appellees' argument: that an order granting fees is itself final by way of being litigation-terminating, and the subsequent fixing of the amount of fees is collateral. This approach, which would encourage multiple appeals, is particularly inappropriate in a case such as this where the quantum of fees is a major issue. Appellees' argument was rejected by the en banc Third Circuit in *Croker* v. *Boeing Co.*, 662 F.2d 975, 983-84 (3d Cir. 1981), which specifically disapproved a case on which appellees rely on this point, *Delong Corp.* v. *Raymond Int'l, Inc.*, 622 F.2d 1135 (3d Cir. 1980). *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 481 n.7 (1980), where attorneys' fees were to be awarded out of an already-fixed judgment fund, is not to the contrary. We have jurisdiction to hear this appeal.

III.

Appellees make their claim for attorneys' fees under the remedial authority of the Back Pay Act, which grants certain specified relief to

> (b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel

> action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee— . . . .

5 U.S.C. § 5596(b)(1) (Supp. V 1981). The Reform Act expanded this relief to include "reasonable attorney fees related to the personnel action." Pub. L. No. 95-454, § 702, 92 Stat. 1216 (codified at 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. V 1981)). Application of the Reform Act to actions commenced before passage of that Act (such as this suit) is limited by the Savings Clause. If the Savings Clause applies to that part of the Reform Act which grants attorneys' fees in Back Pay Act cases, appellants will prevail. We find that it does.

The savings provision of the Reform Act provides in pertinent part:[3]

> (b) No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

Pub. L. No. 95-454, § 902(b), 92 Stat. 1224 (codified at 5 U.S.C. § 1101 note (Supp. V 1981). Our first inquiry, then, is whether the suit in the district court was an "administrative proceeding" or an appeal therefrom.

The Back Pay Act states that relief, including attorneys' fees, is available when an "appropriate authority" finds that there was an "unjustified or unwarranted personnel action" and that finding is "on the basis of a

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[3] Appellants also argue for application of the third subsection of the Savings Clause, Pub. L. No. 95-454, § 902(c), 92 Stat. 1224, which refers to any "suit, action, or other proceeding lawfully commenced by or against the Director of the Office of Personnel Management or the members of the Merit Systems Protection Board, or officers or employees thereof . . . ." While the relevance of subsection (c) is not clear to us, we decide on the basis of subsection (b) and need not address the other issue.

timely appeal or an administrative determination." It is accepted practice for district courts to grant relief under the Back Pay Act even in suits that are not appeals from an administrative determination under any statutorily established appeal procedure. The instant case is just such a proceeding,[4] and the State Department does not challenge the applicability of the Back Pay Act. For the purpose of this case, we read the Back Pay Act as supplying a remedy in suits in the district courts such as this one. We must inquire, then, whether the meaning assigned to certain words in the Back Pay Act should also be assigned to them in the Reform Act's Savings Clause, when the question is the applicability of the latter to the former.

The natural first response to this question is to demand consistency in the interpretation of related and almost identical statutory phrases. Arguments of consistency do carry weight, and surely it would be at least anomalous to give appellees the benefit of an interpretation of words in applying the Back Pay Act and deny that very benefit to the government in interpreting the Savings Clause. But while they are influential, principles of consistency cannot be regarded as dispositive; words can mean one thing in one place and something else in another.

We turn, therefore, to considerations of statutory structure and history, and find that they support the applica-

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[4] Plaintiffs below did not sue under any statutory prescribed "appeal" procedure. Appellants have argued that State Department grievance hearings constituted "administrative proceedings" within the meaning of the Savings Clause, so that this suit is an appeal therefrom instituted before the Reform Act passed. Appellees have controverted this claim. While we treat this suit as wholly de novo, the alternative is to regard it as an appeal from agency proceedings as appellants urge. Since the Savings Clause applies in either event, the outcome here does not turn on our decision as to whether this case is an appeal from an agency determination in the usual sense of these words.

tion of the Savings Clause to the Back Pay Act. By way of structure, we observe that the Reform Act provides for attorneys' fees in two sections of Title 5 of the U.S. Code: section 7701 and section 5596 (the Back Pay Act). Pub. L. No. 95-454, §§ 205, 702, 92 Stat. 1138-40, 1216. Section 7701 is a basic provision regulating the appellate procedures of the Merit Systems Protection Board—principally, hearings before the Board and its administrative law judges. 5 U.S.C. § 7701 (Supp. V 1981). Under section 7701(g)(1), the Board or its law judge may award attorneys' fees to prevailing employees. We note that proceedings under section 7701 are administrative in nature.

The other Reform Act attorneys' fees provision is the amendment to the Back Pay Act at issue in this case. Section 5596, as it has been interpreted, prescribes the applicable remedies in both administrative and judicial proceedings; either an agency or a court may be an "appropriate authority" that remedies an "unjustified or unwarranted personnel action."[5] Under the Reform Act amendments to the Back Pay Act, either may be required to award reasonable attorneys' fees to a prevailing employee.

There are, then, three classes of decision-makers who may be called upon to award attorneys' fees under the Reform Act's fee provisions: (1) the MSPB and its administrative law judges, (2) other agency adjudicators providing relief pursuant to the Back Pay Act, and, given the construction we are accepting *arguendo*, (3) courts acting under the Back Pay Act. Two of these types of decision-makers are administrative, one judicial. By its terms, the Savings Clause applies to "administrative proceedings." Hence there is no question but that the

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[5] *Cf.* Hoska v. United States Department of Army, 694 F.2d 270, 274-75 (D.C. Cir. 1982) (court of appeals authorized under Back Pay Act to award attorneys' fees in appeal from decision of Merit Systems Protection Board).

Savings Clause applies to two of the three situations in which the Reform Act provides for fees. There is no reason to suppose that the third situation, that of judicial relief under the Back Pay Act, should be treated any differently.[6] The case is strong, therefore, for treating attorneys' fees claims in district court cases no more favorably than claims in administrative proceedings.

The legislative history supports this structural analysis. As the parties virtually agree, there is really nothing to be gathered from the history of the Savings Clause.

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[6] Only one argument for treating de novo suits in which relief is sought under the Back Pay Act differently occurs to us. Such suits are most likely where there is no effective agency remedy available. Indeed, the district court in this case specifically disapproved the overcomplement system that gave rise to this suit because of its lack of procedural safeguards. J.A. at 69. Appellees seek to rely on this failure, and urge that it would be unjust to apply a savings provision that speaks of administrative proceedings to benefit an agency whose wrongdoing is precisely a failure to provide such proceedings. Brief for Appellees at 32.

This appeal to justice seems to us misplaced. For one, we do not hold that anything the State Department did (or did not) constituted administrative proceedings under the Savings Clause; rather, we interpret the phrase "appeals" from "administrative proceedings" in the Savings Clause to include suits such as this, just as the phrase "timely appeal or an administrative determination" in the Back Pay Act includes this suit. Moreover, by invoking the Savings Clause, the State Department is not attempting to profit from its own wrong. Had agency procedures been available to appellees, and had they pursued those procedures at the time they brought this lawsuit, the Savings Clause would clearly apply —that is, had the State Department treated appellees correctly by providing administrative procedures, they would not be entitled to attorneys' fees. The State Department's failure to provide procedures forced appellees to replace administrative proceedings in which no fees would have been available with a lawsuit in which they now seek fees. All that appellees are entitled to in this case is the treatment they would have had had the State Department behaved properly; since such treatment does not include attorneys' fees, considerations of fairness do not support appellees' reading of the Savings Clause.

We find, however, that the treatment of the attorneys' fees provisions of the Reform Act is suggestive. The Conference Report, in its brief discussion of attorneys' fees, treats section 7701(g)(1) and section 5596(b)(1)(A)(ii) in the same paragraph. H.R. Rep. No. 1717, 95th Cong., 2d Sess. 142 (1978) (Conference Report). Congress considered section 7701(g)(1)—to which the Savings Clause applies—and section 5596(b)(1)(A)(ii)—to the administrative aspect of which the Savings Clause applies—together. There was no suggestion that the judicial aspect of section 5596 be separated and treated specially.[7] We find no reason to treat differently provisions which analytically fit together and which Congress considered together. The Savings Clause should apply to all of them.

Our decision is based on a reading of two parts of the Reform Act as they relate to one another. An examination of other possible guides to interpretation shows that they are of extremely limited usefulness in deciding the highly specific and somewhat unusual question presented in this case. In order to set our statutory analysis in proper context, we canvass briefly the other relevant authorities.

Most nearly on point is the case of *Nibali* v. *United States*, 634 F.2d 494 (Ct. Cl. 1980), an employee's back pay case brought prior to passage of the Reform Act but decided by the court subsequent to passage. Plaintiff Nibali, after prevailing on the merits, sought attorneys' fees under the Back Pay Act as amended by the Reform Act. The Court of Claims rejected the petition for fees,

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[7] The Senate and House committee reports do treat the amendments to the Back Pay Act separately from section 7701(g)(1), but only the House Report includes a provision for attorneys' fees, and it does not suggest that administrative and judicial proceedings should be treated differently in any way. S. Rep. No. 969, 95th Cong., 2d Sess. 114-15 (1978); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 60-61 (1978).

finding that the Reform Act amendments granting attorneys' fees should not apply to suits instituted before the statute was enacted. In its holding, then, *Nibali* is fully in accord with our decision today. Unfortunately, the plaintiff's argument, rejected by the court, was sufficiently peculiar to render the reasoning of the case largely unhelpful. Nibali seems to have rested his case on a negative inference of retroactivity of the attorneys' fees provision from the fact that the Savings Clause did not in terms cover suits in the Court of Claims. *Id.* at 496. While the Court of Claims was appropriately unimpressed with this approach, the decision in *Nibali* responds to the convoluted structure of the plaintiff's argument. Since appellees here do not present their claim in such a fashion, *Nibali* is only slightly persuasive on appellants' behalf.

On the other side of the question, but even less persuasive, is *Payne* v. *Panama Canal Co.*, 607 F.2d 155 (5th Cir. 1979). There the Fifth Circuit evidently assumed that the Reform Act amendment to the Back Pay Act made attorneys' fees available in an action commenced before and decided after 1978. *Id.* at 160-63. Unfortunately, the court of appeals did not address the Saving Clause; it found that Congress had been silent on the retroactivity question. *Id.* Having found that the Reform Act amendment to the Back Pay Act was applicable to suits instituted before the Reform Act passed, the *Payne* court went on to find that the amendment only granted fees in cases growing out of unfair labor practices and Chapter 71 grievances. *Id.* at 163-64. This is an extremely strained reading of section 5596(b)(1)(A)(ii),[8]

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[8] The principal support for the Fifth Circuit's interpretation appears to be the heading of section 702 of the Reform Act, which effected the amendment of section 5596: "Backpay in Case of Unfair Labor Practices and Grievances." Pub. L. No. 95-454, § 702, 92 Stat. 1216. But what the section is called and what it says are not the same thing.

as the district court noted in this case. 496 F. Supp. at 363-64. *Payne* does little to aid our inquiry.

Two decisions of this court discussed by the parties are of extremely limited relevance. *Kyle* v. *ICC*, 609 F.2d 540 (D.C. Cir. 1979), interpreted the Savings Clause, but did so in the context of normal appellate review of a Merit Systems Protection Board decision. *Kyle* did not involve the remedial authority of a district court under the Back Pay Act and is not suggestive where the puzzle is the application of the Reform Act's Savings Clause to that part of the Reform Act that amends the Back Pay Act. Similarly, *Frazier* v. *Merit Systems Protection Board*, 672 F.2d 150 (D.C. Cir. 1982), interprets the attorneys' fees provision of 5 U.S.C. § 7701(g)(1) (Supp. V 1981), which applies to cases before the MSPB, not the courts.

Appellants, following *Kyle*, suggest that the MSPB's regulations implementing the Savings Clause are instructive:

> (b) *Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. . . . An agency proceeding is considered to exist once the employee has received notice of the proposed action.

5 C.F.R. § 1201.191(b) (1983). This provision, by its terms, applies to administrative proceedings. Its reference to the Board and to notice strongly suggests that the regulation is not at all addressed to district court suits to which the Back Pay applies. This regulation has the same problem here as does the *Kyle* case: it does not address the peculiar statutory posture of the Back Pay Act.[9]

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[9] Another possible source of guidance is a former Civil Service Commission regulation (in effect when suit was filed), 5 C.F.R. § 550.803 (1974), which prescribed certain cases to which the

Since this suit was instituted before the Reform Act was passed, the Savings Clause of that Act requires that the Back Pay Act be applied as it would have been prior to the Reform Act. The unamended Back Pay Act makes no provision for attorneys' fees. Accordingly, the orders of the district court granting attorneys' fees are reversed, and the order of the district court denying certain parts of the fee application is affirmed on the grounds that no fees should have been awarded.

No. 81-2213: *reversed.*

No. 81-2353: *reversed.*

No. 82-1007: *affirmed.*

Back Pay Act applied. The regulation, in defining "an administrative determination or a timely appeal," refers to *sua sponte* agency corrective action, 5 C.F.R. § 550.803(a) (1974), and to decisions under established agency appeal procedures, 5 C.F.R. § 550.803(b) (1974). The definition does not, however, address court decisions not taken pursuant to an established appeal procedure, and so is not helpful in this case.

Separate Statement of BORK, *Circuit Judge*: I write this additional statement to preserve an issue not reached in my opinion for the court. We decide today that attorneys' fees are not available to appellees because of the Reform Act's Savings Clause. In reaching this holding, we assume that, absent the Savings Clause, the Back Pay Act applies to cases such as this—that is, to de novo suits in district court that are not brought pursuant to any statutory appeal procedure. As the opinion for the court notes, appellants do not challenge the Back Pay Act's applicability, and the issue has not been briefed and argued. Moreover, a decision that the Back Pay Act does not apply would lead to the same judgment—that appellees are not entitled to fees. Under the circumstances, we appropriately assume that the Back Pay Act applies. The Savings Clause will not apply, however, to suits brought after the passage of the Reform Act; it is for such cases that I raise this matter.

Had the issue been joined, it seems to me that we might well have decided that the Back Pay Act does not cover cases of this sort. According to that Act, relief is available "on the basis of a timely appeal or an administrative determination." 5 U.S.C. § 5596(b)(1) (Supp. V 1981). This suit is neither. Unlike *Hoska* v. *United States Department of Army*, 694 F.2d 270 (D.C. Cir. 1982), for example, this case does not involve an earlier appeal to an agency whose decision was then reviewed by a court. It seems unnatural to read the phrases "timely appeal" or "administrative determination" to cover an original action in the district court. In addition, the legislative history may plausibly be read to dispose of the issue. "The words 'timely appeal' refer to an appeal which is properly made to a Government agency or to the U.S. Civil Service Commission . . . ." H.R. Rep. No. 32, 89th Cong., 1st Sess. 4 (1965) (House Report on Back Pay Act). No mention is made of courts.

While it is impossible confidently to say how we would have decided this issue had there been briefing and argument, I raise the question lest an apparent misreading of the Back Pay Act become established law through inattention.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 74-0494

JAMES D. CROWLEY, *et al.*,
Plaintiffs

v.

ALEXANDER M. HAIG, JR., *et al.*,
Defendants

[Filed September 25, 1981]

ORDER

It is by the Court this 25th day of September, 1981,

ORDERED, that the following corrections and amendments are made to this Court's Memorandum Opinion and Order dated September 15, 1981:

On page 6, the chart for Lawrence Speiser shall appear as follows:

A. LAWRENCE SPEISER

Year	Hours	Rate [2]	Total
1973	19.2	$ 75.00	$ 1,440.00
1974	90.9	83.25	7,567.43
1975	30.5	90.83	2,770.32
1976	39.1	96.08	3,756.73
1977	48.4	102.30	4,951.32
1978	93.6	109.95	10,291.32
1979	240.2	122.70	29,472.54
1980	166.60	139.20	23,190.72
1981	68.00	148.28	10,083.04
	TOTAL 796.5		$93,523.42

[2] Adjustment for inflation.

and it is

FURTHER ORDERED, that on page 6, the total in the hours column for John P. Racin is changed from "508.1" to "395.8"; and it is

FURTHER ORDERED, that on page 6, the total attorney fees is changed from $132,308.17" to "$132,-340.88"; and it is

FURTHER ORDERED, that on page 6, the total fees and costs and the amount to which Plaintiffs are entitled is changed from $138,229.86" to "$132,262.57".

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 74-0494

JAMES D. CROWLEY, *et al.*,
Plaintiffs

v.

ALEXANDER M. HAIG, JR., *et al.*,
Defendants

[Filed September 15, 1981]

MEMORANDUM OPINION AND ORDER

The issue before the Court is the amount of attorneys fees and costs to which Plaintiffs are entitled. Their entitlement to an award of fees and costs has already been determined. *See* Order, May 22, 1980; Order December 1, 1980. The Court must now engage in the analysis mandated by our Court of Appeals in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

I. Number of Hours Reasonably Expended

The first determination the Court must make is whether the number of hours claimed for compensation is reasonable. *Copeland*, 641 F.2d at 891. With the exception of time spent in discovery on the attorneys fees issue, all of the time for which compensation is demanded was reasonably expended in furtherance of this litigation.[1] Plaintiffs are entitled to compensation for that time.

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[1] The time spent by law clerks was reasonable but is compensable through an award of costs rather than through an award of fees. *See* Jordan v. Dep't of Justice, No. 76-0276 (D.D.C. February 26, 1981) slip op. at 8.

This case involved a challenge to the Department of State's illegal placement of employees in an over-complement status. It required representation of individual claims before a special master and necessitated a great amount of attorney work on unique legal and factual issues. Despite the Government's assertions to the contrary, the work performed by Plaintiffs' counsel was necessary to this litigation and compensation for that time is warranted. The Government compares the time its attorneys spent on various aspects of this case with that spent by Plaintiffs' counsel. It challenges that accuracy of Plaintiffs' attorneys' time sheet summarization. And it questions the amount of time spent on certain tasks in light of the written work presented. The "billing judgment" to be exercised by the Court, *id.*, does not require the scrutiny suggested by the Government.

Once the Court has satisfied itself with the documentation presented and has evaluated the reasonableness of the number of hours spent on each task in light of the nature of the case, our inquiry is at an end. The Court is not influenced by the fact that the Government's attorneys spent less time on certain matters than did Plaintiffs' attorneys. Nor are we persuaded by the minor variations between Defendants' summary of time sheets and Plaintiffs' summary. Plaintiffs' last submission, in response to this Court's Order of July 21, 1981, is a thorough and accurate summary. Plaintiffs' briefs to the special master were short in relation to the number of preparation hours; that does not require a finding that the amount of attorney time was unreasonable. Conciseness should not be penalized.

Defendants' assertion that some of the submissions in this case resembled those in *Marimont v. Califano*, No. 73-1992 (D.D.C.) is no basis for declaring unreasonable the time for which compensation is sought. Experienced attorneys will often draw upon their past representation in similar cases. The Government cannot argue that

Plaitiffs' attorneys used "form pleadings". Rather, in drafting the papers for this case, it appears that the attorneys used *Marimont* papers for guidance. Moreover, the Court only looks to the time demanded in relation to the work presented; the submissions in this case justify compensation for the time demanded.

To the contrary, there was no necessity for the discovery engaged in by Plaintiffs' attorneys on the attorneys fees issue. While Plaintiffs are entitled to compensation for time reasonably expended by their attorneys in litigating the attorneys fees issue, the time spent in discovery was worthless. Plaintiffs apparently sought information which would allow them to challenge the competency of the Government's opposition to their motion for attorneys fees. Depositions were taken of past and present personnel in the Office of the United States Attorney. Areas of inquiry included how work is performed in the United States Attorney's Office and how much time is spent in performing that work. Questions were also asked about fee awards in other cases. The only relevant matters in attorneys fees litigation are whether the hours spent were reasonable and whether the rates demanded are those charged in the market for similar work. It was not necessary to depose employees of the Office of the United States Attorney to obtain information on those matters. Researching the files of recent cases in this Court in which fees were awarded would have netted all the necessary market rate information. Inquiry on other matters was irrelevant. Plaintiffs' attorneys fee discovery is not justified by the fact that the Government engaged in similar discovery. As stated above, what Government attorneys did in this case is not our focus in addressing the amount of fees to which Plaintiffs are entitled. Compensation will not be awarded for the hours expended by Plaintiffs' attorneys in discovery on the attorneys fees issue.

Thus, the reasonably expended hours chart suggested in *Copeland, id.* at 892, appears as follows:

ATTORNEY & TYPE OF WORK	HOURS
SPEISER:	
Research	66.0
Discovery	16.3
Pleadings	230.9
Hearings	249.7
Conferences	233.6
TOTAL	796.5
DOBROVIR:	
Research	4.60
Pleadings	7.90
Hearings	2.40
Conferences	11.725
TOTAL	26.625
RACIN:	
Research	63.8
Pleadings	312.5
Hearings	3.5
Conferences	16.0
TOTAL	395.8
LINKSOLD:	
Pleadings	75.4
Hearings	32.0
TOTAL	107.4
TOOMBS:	
Pleadings	62.3
Research	17.4
TOTAL	79.7
MUNGER:	
Research	3.8
Pleadings	5.3
Conferences	34.8
TOTAL	43.9

II. Reasonable Hourly Rate

The $75/hour rate for the years 1973-75 and the $100/hour rate for the years 1976-81 demanded for attorney Speiser are reasonable for the type of work involved and the skill required. Plaintiffs' references to similar awards are persuasive. Moreover, this Court recently made similar awards in cases requiring similar skill. *See Veterans Education Project, v. Secretary of the Air Force*, No. 79-219 (D.D.C. May 15, 1981); *North Slope Borough v. Andrus*, No. 79-3193 (D.D.C. May 5, 1981). The minimal payment made by Plaintiffs to their attorneys during the course of this litigation in no way affects the award in this case. That payment was clearly not intended to be payment in full but was rather a stipend during the course of the litigation.

The $60/hour and $40/hour demanded for associates working on this litigation are also reasonable hourly rates as are the fees for Mr. Dobrovir.

III. Adjustments to the Lodestar

The hourly rates to be awarded take into account the skill required and the quality of representation. No adjustment is necessary on those bases. The adjustment for inflation, *see, e.g., Parker v. Lewis*, No. 79-3433 (D.D.C. June 30, 1980), takes into account the delay in payment. No greater adjustment is needed to account for the contingent nature of fees awarded since Plaintiffs' counsel received some payment during the course of this litigation, *albeit* a fraction of the fees to which they are entitled.

IV. Conclusion

Plaintiffs' attorneys are entitled to the following fee awards and costs:

A. LAWRENCE SPEISER

Year	Hours	Rate [2]	Total
1973	19.2	$ 75.00	$ 1,440.00
1974	90.9	83.25	7,567.43
1975	30.5	90.83	2,770.32
1976	39.1	96.08	3,756.73
1977	48.4	102.30	4,951.32
1978	93.3	109.95	10,258.34
1979	240.2	122.70	29,272.54
1980	166.60	139.20	23,190.72
1981	68.00	148.28	10,083.04
	TOTAL 875.1		93,490.71

B. WILLIAM A. DOBROVIR

Year	Hours	Rate	Total
1980	4.90	$139.20	$ 628.08
1981	21.725	148.28	3,221.38
	TOTAL 26.625		$ 3,903.46

C. JOHN P. RACIN

Year	Hours	Rate	Total
1980	305.3	$ 60.00	$ 18,318.00
1981	90.50	60.00	5,430.00
	TOTAL 508.1		23,748.00

D. BARBARA D. LINDSKOLD

Year	Hours	Rate	Total
1979	73.5	$ 40.00	$ 2,940.00
1980	33.9	40.00	1,356.00
	TOTAL 107.4		$ 4,296.00

E. A. LAWRENCE TOOMBS

Year	Hours	Rate	Total
1976	79.7	$ 60.00	$ 4,782.00

F. JUDITH K. MUNGER

Year	Hours	Rate	Total
1978	34.8	$ 60.00	$ 2,088.00
	TOTAL ATTORNEY FEES:		$132,308.17

COSTS

Xerox	$1,391.51
Commercial reproduction	329.28
Transportation	146.81
Postage	144.20
Transcripts	56.54
Outside secretarial help	50.00
Long distance Telephone Calls	12.46
Luncheon conferences	8.45
Messenger service	19.75
Law clerks	3,657.00
Filing fee and service	13.00
Miscellaneous	92.69
TOTAL	$ 5,921.69
TOTAL FEES AND COSTS:	$138,229.86

Therefore, it is by the Court this 15th day of September, 1981,

ORDERED, that Plaintiffs are entitled to an award of attorneys fees and costs of $138,229.86.

—

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 74-494

JAMES D. CROWLEY, *et al.*,
Plaintiffs

v.

EDMUND S. MUSKIE, *et al.*,
Defendants

[Filed May 22, 1980]

MEMORANDUM OPINION

The instant action has had a long and troubled history. In 1974 Plaintiffs brought a class action suit claiming that Defendants placed Plaintiffs in "over-complement" status, thus depriving them of their rights as Civil Service employees. On June 24, 1977, in a Memorandum Opinion and Order, this Court granted partial Summary Judgment to Plaintiffs. The only issues remaining after the issuance of the 1977 Opinion were (1) what individuals were placed in overcomplement status, and (2) what relief is appropriate to those individuals.

On October 28, 1977, this Court signed a consent decree and order that provided for the effectuation of notice to all members of the class, informing them of their right to file claims for any specific career damage or loss of opportunity they believed they may have suffered by reason of their having been placed in overcom-

plement status. On November 1, 1978, another stipulation and consent agreement was signed by the Court establishing procedures to resolve the claims of all individuals dissatisfied with Defendants' settlement offers. The November 1 agreement provided, *inter alia*, that all claims would be presented to a Special Master for resolution, that Paul Weil, a retired Administrative Law Judge, shall serve as Special Master, and that all recommendations of the Special Master are appealable to this Court. Now before the Court are objections to the findings and recommendations made by Special Master Weil.

I. The Class

The Class, as defined by this Court's Order of January 2, 1975, is composed of all Civil Service employees whose positions have been abolished and who have been placed in overcomplement status. The Special Master found that two individuals, Willie Waiters and Leonard Pomeroy, did not meet this description. While Mr. Waiters has been placed in a dead end job that might be akin to overcomplement status, his position has not been abolished. He is not a member of the Plaintiff class. Likewise, Mr. Pomeroy was a Foreign Service Reserve Officer placed in Foreign Service overcomplement status. Foreign Service overcomplemency was not encompassed by this litigation; Pomeroy is therefore not a member of the Plaintiff class. The findings of the Special Master regarding the claims of Waiters and Pomeroy must be affirmed.

II. Defendants' Objections

Defendants object to portions of the Special Master's findings on four grounds, to wit: (1) that the recommended retroactive promotion, back pay, and money damage relief is barred by the doctrine of immunity, (2) that the recommended order of monetary relief to two claimants (Newmaster and Smith) would violate

the Classification Act, 5 U.S.C. §§ 5536 *et seq.*, (3) that one claimant (Collins) is precluded from receiving damages because of the Statute of Limitations, and (4) that the recommendation providing for attorney's fees is contrary to law. The Court finds that Defendants' claims are without merit, and grants all of the relief recommended by Special Master Weil.

A. The Back Pay Act

This Court has already found that Plaintiffs were wrongfully removed from their Civil Service jobs when they were placed in overcomplement status, that the placement of Plaintiffs in overcomplemency constituted illegal reductions in force and adverse actions, and that Plaintiffs were entitled to damages.[1] Defendants did not appeal the Court's findings; rather, they consented to the judgment of the Court. The October 28, 1977 stipulation indicates the scope of this consent. It provides for the giving of notice to potential members of the class, and indicates what remedies were envisioned by Defendants. That stipulation states, *inter alia*, that Plaintiffs should

> file a claim for any *specific career damage or loss of opportunity* . . . suffered by reason of having been placed [on overcomplement] status.
>
> If [Plaintiffs] do not [file notice] by midnight of December 1, 1977, [they will] be unable thereafter to make any claim of *economic or other disadvantages* against the Department . . .

Pursuant to the October 28 stipulation, Defendants entered into settlement negotiations with Plaintiffs. Approximately one third of the Plaintiffs settled their claims; all of those Plaintiffs received money damages, and most received upgraded positions. The November 1,

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[1] See this Court's Memorandum Opinion of June 24, 1977.

1978 stipulation was effectuated to provide relief to those Plaintiffs dissatisfied with Defendants' settlement offers. Special Master Weil was given the authority to ascertain what damages were suffered and what relief was appropriate. Defendants now attempt to resurrect defenses long since waived in the instant litigation. They are precluded from doing so because of the valid settlement agreements and the Back Pay Act.

It is beyond dispute that the settlement agreements provided that Plaintiffs would be compensated for career damage, loss of pay, and loss of opportunity due to overcomplemency. The issues left for resolution by the Special Master were primarily factual, *viz.* what individuals were placed in overcomplement status, and to what extent were their careers damaged by such placement. The only legal issues left unresolved by the settlement agreements were (1) are Plaintiffs entitled to attorneys fees, and (2) were the remedies recommended by the Special Master reasonable in light of the damages suffered by the individual Plaintiffs. The assertions now posited by Defendants exceed the limited scope of objections permissible under the settlement agreements. Since the agreements are valid and enforceable, Defendants are estopped from making these contentions. *See U.S.* v. *McInnes*, 556 F.2d 436, 441 (9th Cir. 1979).

Assuming *arguendo* that the settlement agreements do not preclude the asserted defenses, they must fall as a matter of law. The Back Pay Act, 5 U.S.C. § 5596, states in pertinent part:

> (b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or re-

duction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with Chapter 71 of this Title [5 USCS §§ 7101, et seq.], shall be awarded in accordance with standards established under section 7701(g) of this title [5 USCS § 7701(g)]; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations

> prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title [5 USCS § 5551 or § 5552(1)] but may not be retained to the credit of the employee under section 5552 (2) of this title [5 USCS § 5552(2)].

As the Supreme Court stated in *U.S.* v. *Testan*, 424 U.S. 392, 405 (1976), the Back Pay Act gives the Court the authority to "provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and other 'unwarranted or unjustified actions affecting pay or allowances [that] could occur in the course of reassignment.'" Defendants argue that, contrary to this Court's June 24, 1977 Opinion, overcomplemency did not constitute an "unwarranted or unjustified action affecting pay." Rather, Defendants allege that overcomplemency constituted a "reclassification" which did not reduce Plaintiffs' grades or pay, and therefore Plaintiffs are not entitled to monetary relief.

This contention is meritless. A reclassification action involves individuals who were arguably erroneously classified. *Id.*, at 397-400. Plaintiffs were not erroneously classified. Rather, they were declassified and illegally removed from their positions. They were not reclassified within the meaning of *U.S.* v. *Testan*, *supra*. Defendants claim that Plaintiffs' grades were not "reduced" by their placement in overcomplement status. This allegation is baseless. Plaintiffs were removed from the whole Civil Service process, and thus their grades were completely reduced. The Back Pay Act, and the stipulations entered into by Defendants, each provide authorization for the relief recommended by the Special Master.

B. The Classification Act

The Classification Act, 5 U.S.C. § 5101, was enacted "to provide a plan for classifications whereby . . . the principle of equal pay for substantially equal work would

be followed." *Id.*, at 399. Defendants allege that the relief recommended for Plaintiffs Newmaster and Smith would violate the Classification Act because those Plaintiffs would receive monetary damages in excess of the salary commensurate with the recommended grade. No violation of the Act would result from this Court's affirmance of the Special Master's recommendations, however.

Plaintiffs, by being placed in overcomplement status, were removed from their classification and denied the potential for promotion. This potential for promotion includes the job training inherent in the performance of their Civil Service jobs. Compensation for the deprivation of promotion potential is part of the settlement agreement entered into by Defendants. It is clear that Plaintiffs, who would be qualified to perform certain jobs had they not been put in overcomplemency, are not now qualified to perform those jobs. The damages suffered by Plaintiffs due to the loss of promotion potential is quantifiable, and has been so quantified by the Special Master in the instant case. This compensation merely corrects the injuries suffered by Plaintiffs; as such, it puts them on no better footing than any other Civil Service employee. The Classification Act does not preclude the relief recommended in the instant case.

C. The Statute of Limitations

Defendants' Statute of Limitations claim is insubstantial. They assert that the Special Master found that the primary harm suffered by Plaintiff Collins resulted from overcomplemency occurring prior to March of 1968, and this Ms. Collins is not entitled to relief. In his report, however, the Special Master specifically mentioned that Ms. Collins could only be compensated for injury occurring within the limitations period. He granted relief only for the damages resulting from the overcomplemency suffered by Collins subsequent to March 1968. Ms. Collins is entitled to the relief recommended by Mr. Weil.

D. Attorney's Fees

Plaintiffs predicate their claim for attorney's fees on the Back Pay Act. *See* page 4, *supra*. The government contends that the Back Pay Act waives sovereign immunity regarding attorney's fees only with respect to appeals heard before the Merit Systems Protection Board and its agents, and certain unfair labor practice cases and grievances decided and process pursuant to Chapter 71, Title V, of the United States Code. They cite *Payne* v. *Panama Canal Co.*, 607 F.2d 155 (5th Cir. 1979) as authority for this proposition. Defendants are correct that *Payne* supports their analysis. Unfortunately, neither the Court in *Payne*, nor Defendants in this case, give a fair reading to the Back Pay Act.

Plaintiffs are employees of the State Department, an agency within the meaning of the Back Pay Act. This Court, an appropriate authority within the meaning of that Act, has found that Plaintiffs were affected by unjustified personnel actions that resulted in the reduction of pay. Plaintiffs are therefore entitled to

> reasonable attorney's fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under the procedure negotiated in accordance with Chapter 71 of this Title . . . , shall be awarded in accordance with the standards established under section 7701(g) of this Title.

5 U.S.C. § 5596(b)(1)(A)(ii). Under this provision, all prevailing Plaintiffs are entitled to reasonable attorney's fees related to the personnel action. If the personnel action involves an unfair labor practice or a Chapter 71 proceeding, then the amount of the attorney's fees must be ascertained in accordance with 5 U.S.C. § 7701(g). Otherwise, as in the instant case, attorney's fees are to be ascertained as is consistent with prevailing standards.

III. The Special Master's Recommendations

The Special Master has carefully sifted through the morass of information underlying Defendants use of overcomplemency. In every instance, his recommendations reflect a sensitivity to the needs of both Plaintiffs and Defendants. Neither side has objected to his factual findings, nor claimed that the recommended remedies are disproportionate to the injuries suffered. This being the only legal basis upon which to predicate a challenge to the Special Master's recommendations, it is by the Court this 22nd day of May, 1980,

ORDERED, that the Special Master's recommendations, as reflected in the Order affixed hereto, be AFFIRMED, *in toto*.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 74-494

JAMES D. CROWLEY, *et al.*,
Plaintiffs

v.

EDMUND S. MUSKIE, *et al.*,
Defendants

[Filed May 22, 1980]

ORDER

In light of the Memorandum Opinion affixed hereto, it is by the Court this 22nd day of May, 1980,

ORDERED, that the Special Master's findings and recommendations be and hereby are adopted by the Court in their entirety; and it is

FURTHER ORDERED, that Plaintiffs are entitled to all the relief recommended by Special Master Weil; and it is

FURTHER ORDERED, that Defendants shall comply with those recommendations expeditiously.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

Civil Action No. 74-494

GEORGE SHULTZ, SECRETARY OF STATE, *el al.*,
Appellants

v.

JAMES D. CROWLEY, *et al.*

Appeal from the United States District Court
for the District of Columbia

[Filed September 18, 1986]

Before: BORK and SCALIA, Circuit Judges, and MACKINNON, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the order of the District Court awarding attorney's fees to

appellees is hereby reversed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 18, 1986

Opinion for the Court filed by Circuit Judge Scalia.

Dissenting Opinion filed by Senior Circuit Judge MacKinnon.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5667

GEORGE SHULTZ, SECRETARY OF STATE, *et al.*,
Appellants

v.

JAMES D. CROWLEY, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 74-0494)

On Appellees' Petition for Rehearing and
Suggestion for Rehearing En Banc

Filed December 12, 1986

Charles A. Hobbie and *Mark D. Roth* were on appellees' petition for rehearing and suggestion for rehearing *en banc.*

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS and D. H. GINSBURG, *Circuit Judges*; MACKINNON, *Senior Circuit Judge*

ORDER

Appellees' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

Before: BORK, *Circuit Judge*, and MACKINNON, *Senior Circuit Judge*

ORDER

Upon consideration of appellees' petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

Statements of Circuit Judge Bork and Senior Circuit Judge MacKinnon are attached.

Statement of *Circuit Judge* BORK:

BORK, *Circuit Judge*: In their petition for rehearing, appellees assert that the majority's decision in *Shultz* v. *Crowley*, 802 F.2d 498 (D.C. Cir. 1986), is inconsistent with *Center for Science in the Public Interest* v. *Reagan*, 802 F.2d 518 (D.C. Cir. 1986) (*CFSPI*). I think not and offer a brief explanation.

Crowley concerned the applicability of the Equal Access to Justice Act ("EAJA") to a fee application for a case the merits of which had been resolved before the EAJA's original 1981 effective date. Both the *Crowley* majority, 802 F.2d at 500, and its dissent, 802 F.2d at 505, recognized that, by the law of this circuit, pendency of a fee application alone on the EAJA's 1981 effective date does not permit invocation of the EAJA, *Nichols* v. *Pierce*, 740 F.2d 1249 (D.C. Cir. 1984). Strict construction of the EAJA as a waiver of sovereign immunity requires this result. *Nichols*, 740 F.2d at 1255-59. The *Crowley* majority and dissent disagreed instead about the finality and appealability, and hence the pendency, of the merits of Crowley's case.

CFSPI held that a fee request pending on the effective date of the 1985 EAJA amendments is within the statutory meaning of "cases pending" to which the amended EAJA definition of the "position of the United States" applies, although the merits of the case for which fees are requested are not pending on that date (but were pending on the 1981 effective date of the original EAJA). Since in amending the definition of "position of the United States" Congress intended merely to "clarify" the original EAJA, the panel found that application of this amendment to pending fee requests in cases whose merits are not pending would not constitute a waiver of sovereign immunity requiring strict statutory construction. *CFSPI*, 802 F.2d at 523-24; *accord Russell* v. *National Mediation Board*, 775 F.2d 1284, 1288 (5th Cir. 1985). In making this finding, the *CFSPI* panel expressly dis-

tinguished the *Nichols* decision, and therefore *a fortiori* the *Crowley* decision in pertinent part, as turning on sovereign immunity concerns irrelevant to the provision of the EAJA's 1985 amendments at issue in *CFSPI*. *CFSPI*, 802 F.2d at 524 n.11.

No conflict exists, therefore, between *CFSPI*'s holding that a fee application alone is a "case pending" for some 1985 EAJA amendment purposes and *Crowley*'s holding, following *Nichols*, that a fee application alone is not a "case pending" for purposes of the original 1981 EAJA.

MACKINNON, *Senior Circuit Judge* (concurring). While I continue in the belief that the merits of the case, along with the fee application, were pending on October 1, 1981 for reasons set forth in my dissent, I recognize that at least for the time being, the law of the case is set forth in the majority opinion and that is presently controlling. I therefore concur in Judge Bork's statement denying appellees' motion for rehearing and do not suggest *en banc* hearing since the proceeding in my opinion does not involve a question of exceptional importance within the meaning of F.R. App. P. 35(a).

APPENDIX J

EQUAL ACCESS TO JUSTICE ACT, Sections 204, 208, Pub. L. No. 96-481, 94 Stat. 2321, 2325, 2327 (1980)

AWARD OF FEES AND OTHER EXPENSES
IN CERTAIN JUDICIAL PROCEEDINGS

SEC. 204. (a) Section 2412 of title 28, United States Code, is amended to read as follows:

"§ 2412. Costs and fees

* * * *

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

"(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or

deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

"(2) For the purposes of this subsection—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

"(B) 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole

owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

"(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity.

"(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

* * * *

EFFECTIVE DATE AND APPLICATION

SEC. 208. This title and the amendments made by this title shall take effect on October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States Code, and any civil action or adversary adjudication described in section 2412 of title 28, United States Code, which is pending on, or commenced on or after, such date.

Supreme Court, U.S.
FILED
JUN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1470

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES D. CROWLEY, ET AL., PETITIONERS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1470

JAMES D. CROWLEY, ET AL., PETITIONERS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred in holding that they were not entitled to attorneys' fees under the Equal Access to Justice Act (EAJA or Act), 28 U.S.C. 2412(d), because their case was not "pending" on October 1, 1981, the effective date of the Act.

1. Petitioners brought this suit in 1974 to challenge the legality of certain State Department employment procedures. On May 22, 1980, the district court ruled that petitioners were entitled to mone-

tary relief and attorneys' fees under the Back Pay Act, 5 U.S.C. 5596(b)(1)(A)(ii). The government filed a notice of appeal from this decision, but on September 12, 1980, the appeal was dismissed on the government's motion. Pet. App. 2a.

Petitioners then filed an application for attorneys' fees under the Back Pay Act, which was granted by the district court on September 15, 1981. This award was subsequently reversed by the court of appeals, which held that petitioners were not entitled to fees under that statute. *Crowley* v. *Shultz*, 704 F.2d 1269 (D.C. Cir. 1983). By this time, however, EAJA had come into effect; petitioners therefore returned to the district court and, on June 13, 1983, filed an application for fees under EAJA. The government opposed the application, noting that EAJA authorized fee awards only in cases "pending on, or commenced on or after" October 1, 1981 (Pub. L. No. 96-481, § 208, 94 Stat. 2330), and arguing that this case was not "pending" on that date because only the fee application itself remained unresolved in October 1981. The district court nevertheless held that petitioners were entitled to fees under the Act. Pet. App. 3a.

2. The court of appeals reversed in an opinion by then-Judge Scalia. Under circuit precedent, the court noted, a suit is not "pending" within the meaning of EAJA "when it has been finally resolved on the merits and only collateral issues, like the availability or amount of attorney's fees, remain to be resolved" (Pet. App. 3a (citing *Nichols* v. *Pierce*, 740 F.2d 1249 (D.C. Cir. 1984)). Recognizing this, petitioners argued that their case was in fact pending on October 1, 1981, because, when the government appealed from the September 15, 1981, order fixing attorneys' fees under the Back Pay Act, it

could have appealed the merits of the case as well (see Pet. App. 3a-4a).[1] The court noted that this argument turned on what it termed the questionable proposition that a case is "pending" on EAJA's effective date so long as an appeal on the merits *could* have been brought in October 1981, even if no appeal was in fact brought (*id.* at 4a-5a). But even granting that proposition, the court held that the merits decision in this case could *not* have been challenged in an appeal from the subsequent order resolving only attorneys' fee issues (*id.* at 5a).

While the court noted that the question whether an order finally resolving the *merits* of a case may be challenged in an appeal from a later order resolving attorneys' fee issues "was once the source of substantial confusion and disagreement among the federal courts" (Pet. App. 5a), the court of appeals concluded that the issue had been resolved by this Court's decision in *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982). That decision, the court of appeals explained, recognized that requests for attorneys' fees are "separate from and collateral to judgments on the merits," and for that reason "can have no effect on the finality (and

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[1] As the court of appeals summarized petitioners' argument: "the District Court's order of May 22, 1980, left unresolved the amount of the attorney's fees award to which it held [petitioners] were entitled under the Back Pay Act. Since that order did not dispose of the 'whole case,' [petitioners] reason, it was merely 'collateral,' and the government could have appealed the merits of the case for sixty days after the date on which the amount of the award was fixed (and thus the 'whole case' decided). Since the amount of the award was fixed on September 15, 1981, they conclude that this suit was pending on October 1, 1981, the effective date of the EAJA." Pet. App. 4a.

thus the appealability) of a judgment finally disposing of the merits of a case" (Pet. App. 7a).

The court of appeals also rejected the suggestion that, under the decision in *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976), a request for attorneys' fees is not collateral if it is made in the complaint, rather than in a post-judgment motion. The court of appeals found "nothing in [this] Court's remarks [in *Liberty Mutual*] that constitutes even a remote indication (much less a holding)" that fee requests made in a complaint are not collateral to the merits (Pet. App. 10a), and the court of appeals noted this Court's subsequent conclusion in *White* that " '[*r*]*egardless of when* attorney's fees are requested,' they are separate from and collateral to the judgment on the merits" (*id.* at 12a (quoting 455 U.S. at 451) (emphasis added by the court of appeals)). The court of appeals also noted that a distinction based on the timing of the fee request "has no basis in logic or policy" (Pet. App. 12a). The court therefore held that the May 1980 order in this case, which disposed of the merits of petitioners' claim, had been final and immediately appealable; as a result, the court held that on October 1, 1981, "no appeal of that order was pending and the time to bring such an appeal had long passed" (*id.* at 14a).[2]

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[2] Judge MacKinnon dissented (Pet. App. 15a-30a). Relying on *Liberty Mutual*, he reasoned "that finality of judgment for purposes of appeal is to be determined on the basis of what was included in the plaintiff's prayer for relief" (*id.* at 24a). Because petitioners sought attorneys' fees in their 1974 complaint, Judge MacKinnon concluded that an appeal on the merits could have been taken after the district court's September 1981 order determining the amount of fees under the Back Pay Act (*id.* at 25a).

3. a. Petitioners contend principally (Pet. 6-9) that the Court should grant review here to resolve a conflict in the circuits on the question whether a case was "pending" within the meaning of EAJA on October 1, 1981, when only a request for attorneys' fees was unresolved on that date.[3] But this question is of no continuing importance. Resolution of the issue can affect only cases that were resolved on the merits prior to 1981, but that are still in litigation over the availability of attorneys' fees. So far as we are aware, this case is the only one that falls into that category. Indeed, even the dissenting judge below expressly indicated that he would not suggest rehearing en banc because "the proceeding in my opinion does not involve a question of exceptional importance" (Pet. App. 91a (MacKinnon, J., concurring)).

Petitioners nevertheless argue that the issue here may have continuing consequences because 1985 legislation reenacting and amending EAJA (which, by the terms of the 1981 legislation, expired in 1984) also contains a "pending" clause: the 1985 EAJA legislation applies to "cases pending on or commenced on or after [August 5, 1985,] the date of the

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[3] Three courts have held that cases were not "pending" for EAJA purposes when the only issues remaining unresolved on October 1, 1981, concerned the availability of attorneys' fees. See *Tongol* v. *Donovan*, 762 F.2d 727 (9th Cir. 1985); *Nichols* v. *Pierce*, 740 F.2d 1249 (D.C. Cir. 1984); *Commissioners of Highways* v. *United States*, 684 F.2d 443 (7th Cir. 1982). Two courts have held that the pendency of an attorneys' fee request does make a case "pending" for EAJA purposes. *Knights of the Ku Klux Klan* v. *East Baton Rouge Parish School Board*, 679 F.2d 64 (5th Cir. 1982); *United States for Heydt* v. *Citizens State Bank*, 668 F.2d 444 (8th Cir. 1982).

enactment of [the] Act" (Pub. L. No. 99-80, § 7(a), 99 Stat. 186). But the courts of appeals have recognized that the two "pending" clauses—one of which appears in a statute making the United States liable for fees as an initial matter, and the second of which appears in a statute that simply amends and clarifies existing law—are not identical.

This is clearly illustrated by the holdings of the District of Columbia Circuit itself. That court has held, in this case and in *Nichols* v. *Pierce*, *supra*, that an action was not pending within the meaning of the original EAJA when only the fee request remained to be resolved on October 1, 1981. But the court of appeals has also expressly distinguished *Nichols* in holding that a case *is* pending within the meaning of the 1985 reenactment when only the fee question remained unresolved on August 5, 1985. *Center for Science in the Public Interest* v. *Regan*, 802 F.2d 518, 524 n.11 (D.C. Cir. 1986). As Judge Bork explained in voting to deny rehearing in the present case, "[s]trict construction of the EAJA as a waiver of sovereign immunity require[d]" the result in *Nichols*; in contrast, in the 1985 legislation "Congress intended merely to 'clarify' the original EAJA," so that application of that legislation "to pending fee requests in cases whose merits are not pending would not constitute a waiver of sovereign immunity requiring strict statutory construction" (Pet. App. 89a (statement of Bork, J.)). Consideration of this case by the Court therefore could shed no light on the meaning of the 1985 EAJA amendments.[4]

[4] Petitioners suggest (Pet. 8-9) that the circuits are split on the meaning of the term "cases pending" in the 1985 EAJA legislation. Even if this were true, the conflict could not be resolved by the Court's consideration of this case, for the

b. Petitioners also contend that this case was in fact pending on the merits on October 1, 1981, asserting that the district court's May 1980 ruling on the merits was not appealable until that court awarded attorneys' fees in September 1981. In making this argument, petitioners appear to acknowledge (Pet. 10-11) that a *post-judgment* request for attorneys' fees is collateral to the merits, and therefore does not affect the finality or immediate appealability of a decision on the merits. But relying on *Liberty Mutual Ins. Co.* v. *Wetzel*, *supra*, petitioners argue (a) that a decision is not appealable until all of the requests for relief in the complaint have been resolved; (b) that petitioners here sought attorneys' fees in their complaint; so that (c) the government could not have appealed the ruling on the merits until the district court finally resolved the fee request in September 1981. In essence, petitioners contend that, while fees requested by means of a post-judgment motion are collateral to the merits, fees requested in the complaint are not. Pet. 9-13.

As the court of appeals explained, petitioners' distinction—which plainly "has no basis in logic or

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reasons that we explain in text. In any event, the courts in fact have held with near uniformity that a case was pending within the meaning of the 1985 legislation when only the fee request was outstanding on August 5, 1985. See *Center for Science in the Public Interest*, 802 F.2d at 522 (citing cases). Despite petitioners' contention to the contrary (Pet. 9), this is the position of the Ninth Circuit (see *McQuiston* v. *Marsh*, 790 F.2d 798, 800 (1986)), although that court also has held that portions of the 1985 amendments expanding the class of litigants eligible for fees should not be given retroactive effect (see *American Pacific Concrete Pipe Co.* v. *NLRB*, 788 F.2d 586, 590 (1986)). But see *Blackmon* v. *United States*, 807 F.2d 70 (6th Cir. 1986).

policy" (Pet. App. 12a)—is flatly inconsistent with this Court's decision in *White* v. *New Hampshire Dep't of Employment Security, supra.* The Court there held that attorneys' fee requests are collateral to the merits for finality purposes, explaining that when fees are awarded to a prevailing party (as they are under EAJA, see 28 U.S.C. 2412(d)(1)(A)), "[*r*]*egardless of when* [*the*] *fees are requested,* the court's decision of entitlement to fees will * * * require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed' " (455 U.S. at 451-452 (emphasis added)). And the Court noted as well that attorneys' fees cannot "fairly be characterized as an element of 'relief' indistinguishable from other elements" (*id.* at 452).[5]

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[5] As the court below noted (Pet. App. 12a (citing cases)), at least three circuits have held merits judgments to be final and appealable even when they did not resolve requests for attorneys' fees made in the complaint. The only apparent exception to this approach is the Sixth Circuit's decision in *Penland* v. *Warren County Jail,* 759 F.2d 524 (1985) (en banc), which held that a motion to amend judgment seeking an award of attorneys' fees tolled the time for appealing a magistrate's judgment on the merits. *Id.* at 527. We note that there is a significant factual distinction between *Penland* and this case: in *Penland,* the magistrate ruled simultaneously on the merits and the attorneys' fee request. The *Penland* court of appeals found this procedural background relevant, basing its decision in part on the fact that the magistrate "ruled against [the plaintiff] on the attorney's fee issue in the written opinion [disposing of the merits] rather than deferring the question" (*ibid.*). In any event, even if the Court were inclined to consider the propriety of the *Penland* approach to appealability, this case would not present a suitable vehicle. The question in *Penland* (as it is in most cases

This conclusion is hardly inconsistent with *Liberty Mutual*. In that case, the district court granted partial summary judgment to the plaintiffs on the question of liability, but did not determine what relief should be awarded. The court then certified its decision as final pursuant to Fed. R. Civ. P. 54(b), which permits such certification when the judgment is final as to one but not all of the claims involved in the case. This Court held the certification improper, explaining that, while the plaintiffs had sought a number of different types of relief, those requests were based on one indivisible claim. 424 U.S. at 742-744. The Court also noted that the district court's order was not appealable under 28 U.S.C. 1291 because it did not dispose of all of the plaintiffs' requests for relief; in making that observation the Court listed those requests, including requests for injunctive and monetary relief and for attorneys' fees. 424 U.S. at 742. As the court of appeals noted, there is nothing in this casual language "that constitutes even a remote indication (much less a holding) that the district court's order would not have been appealable under 28 U.S.C. § 1291 had it disposed of all of plaintiffs' prayers for relief except the prayer for attorney's fees" (Pet. App. 10a). And to the extent that there was any ambiguity in the *Liberty Mutual*

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where the collateral nature of an attorneys' fee request is at issue) was whether an appeal on the merits was time-barred. The question here, in contrast, is whether this case was "pending" within the meaning of EAJA on October 1, 1981. These questions, as the court of appeals noted (Pet. App. 4a-5a), are not identical. If the Court is to address the significance of an attorneys' fee request made in the complaint, it would be more useful to do so in a case where the appealability of a merits decision is in fact at stake.

language, it has been resolved by the Court's subsequent decision in *White*.

It is thus clear that the only question remaining open in this case on October 1, 1981, was the availability of fees, a question that was wholly collateral to the merits. The necessary conclusion is that the case was not "pending" on that date within the meaning of EAJA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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